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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945 46

No. 965

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

vs.

WOKO, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED MARCH 19, 1946
CERTIORARI GRANTED APRIL 22, 1946

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 972

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

vs.

WOKO, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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1 In the United States Court of Appeals for the District of Columbia

No. 9021

WOKO, INCORPORATED, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE.

Appeal from decision of the Federal Communications Commission

Joint Appendix

Filed Sept. 1, 1945

In the United States Court of Appeals for the District of
1 Columbia

No. 9021

WOKO, INCORPORATED, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

Notice of appeal from decision of Federal Communications Commission and statement of reasons therefor

Filed May 21, 1945

Notice of appeal

Now comes WOKO, Incorporated, this 21st day of May, 1945, pursuant to Sections 402 (b) (1) and 402 (c) of the Com-
2 munications Act of 1934, as Amended, and files this Notice of Appeal from the decision of the Federal Communications Commission, dated March 27, 1945, effective April 27, 1945, denying appellant's application for renewal of radio station license of Station WOKO. On April 28, 1945, appellant filed with the Federal Communications Commission a Petition for Rehearing of the said Commission's decision of March 27, 1945, which Petition for Rehearing was denied by the Commission on May 1, 1945.

APPELLANT'S STANDING TO APPEAL

Appellant has standing under Section 402 (b) (1) of the Communications Act of 1934, as Amended, to take this appeal as

an applicant for renewal of an existing radio station license whose application has been refused by the Federal Communications Commission.

NATURE OF THE PROCEEDINGS FROM WHICH APPEAL IS TAKEN

Appellant has been for many years the licensee of standard broadcast station WOKO at Albany, New York. This station operates on the frequency 1460 kc with power of 1000 watts day and 500 watts night. On September 29, 1942, appellant filed an application pursuant to Section 308 (a) of the Communications Act of 1934, as Amended, for renewal of its station license. On January 12, 1943, this application was designated for hearing, and by Order dated January 26, 1943, the Commission specified the following issues for the hearing:

"1. To determine whether the representations and statements made to the Commission or its predecessors, the Federal Radio Commission, by the licensee, its officers, directors, stockholders, or agents, with respect to the ownership or transfer of, subscription to, or consideration paid for the stock of WOKO, Inc., truly and accurately reflect the facts.

"2. To determine all the circumstances and conditions under which the stock of WOKO, Inc., has been issued, transferred or assigned.

"3. To determine whether or not the applicant is qualified to continue the operation of Station WOKO.

"4. To determine whether, in view of the facts adduced under the foregoing issues, public interest, convenience and necessity would be served by a grant of this application."

Prior to the commencement of the hearing, appellant filed a motion with the Commission requesting the Commission to amend and enlarge the issues for the hearing so as to permit the appellant to offer testimony as to the nature, character, and extent of the program service rendered by Station WOKO in the past as well as that which would be rendered in the future. The Commission's Order on this motion read in part as follows:

"It Appearing that the hearing issues now designated by the Commission are broad enough to permit, within reasonable bounds, the introduction of the evidence suggested by the proposed issues of the petitioner, and that the requested amendment and enlargement of the hearing issues is therefore unnecessary."

Hearings were held on July 1, 2, 3, 5, 22, August 3, and September 20, 21 and 22, 1943, before a hearing officer designated by the Commission.

On November 13, 1944, the Commission released its proposed findings and conclusions, concluding that the application for re-

newal of license should be denied. The Commission found that some twelve years previously the appellant had failed to disclose that 24% of its stock was beneficially owned by one Sam Pickard or his wife, and that this beneficial ownership had been concealed from the Commission in numerous applications and statements filed with or made to the Commission on behalf of the appellant. Mr. Sam Pickard had been a member of the Federal Radio Commission and was an officer of the Columbia Broadcasting System at the time he acquired his interest in this stock. The Commission did not find or even suggest in its proposed decision that Mr. Pickard or his wife was not qualified to own a minority
4 interest in a corporate licensee of a radio station, or that if the disclosure of their beneficial interest in the stock of the appellant corporation had been made, this would have in any way resulted in Commission action different from that which was taken in any particular instance. In other words, the fact of ownership of a minority interest in appellant corporation by Pickard or his wife was not found by the Commission to have been material in the sense that its disclosure at its inception or at any time subsequent thereto would have justified or required denial of any authorization requested by the appellant. The Commission's proposed conclusions to deny the appellant's application for renewal of license was grounded on the failure to disclose such beneficial ownership and a finding that misrepresentations had been made to the Commission for the purpose of concealing such ownership. The Commission made no finding that the purpose of concealment of said beneficial ownership was to hamper or impede the Commission in the discharge of its functions, to induce or deter it from taking any action, or that such concealment had any effect upon the Commission. The uncontradicted record evidence was that concealment of the Pickard interest was motivated solely by personal business considerations of Pickard, and in no way related to the Communications Commission or its predecessor. The Commission did not find that the appellant, its officers or directors, or its stockholders other than the Pickards, received any benefit whatsoever from such concealment, nor did the Commission find that the motive which Pickard had for concealing his interest in appellant arose out of business interests in which appellant, its officers, directors or stockholders, other than Pickard, had any concern. The Commission did not find that the concealment of Pickard's interest was at the request or solicitation of any officer, director, or stockholder of appellant, or was for any purpose other than to further Pickard's private interest. On the contrary, the Commis-
5 sion's proposed decision disclosed that Howard E. Smith, an officer and holder of 25½% of the stock of the appellant, who was charged by the Commission with having made

misrepresentations to keep secret the beneficial ownership of the Pickards, repeatedly sought to obtain authorization from Pickard to make full disclosure to the Commission concerning his interest in the corporation. The Commission did not find, nor did its proposed decision suggest that in the operation of its radio station or in the discharge of its obligations to the Commission, appellant had been derelict in any degree, except with respect to the disclosure of the Pickard interest.

The uncontroverted record evidence showed that the appellant had at all times discharged its obligation to give a program service in the public interest and that its record in that respect had been not merely unimpeachable, but highly commendable.

Appellant filed exceptions to the Commission's proposed decision, and oral argument was held before the Commission. At this argument, appellant, through counsel, with authorization from Pickard, formally advised the Commission that appellant had offered to purchase, and Pickard had agreed to sell all of Pickard's stock in appellant corporation. After the oral argument the Commission adopted its proposed findings and conclusions, without change, as its final findings and conclusions, and denied the application for renewal of license.

Appellant filed a timely petition for rehearing pursuant to Section 405 of the Communications Act of 1934, as Amended. In this petition appellant tendered to the Commission a plan of reorganization which proposed that appellant corporation would buy up 51% of its outstanding stock which appellant stated would be sold to persons fully qualified and willing to purchase such stock, subject to the approval of the Commission. The beneficial ownership of the remaining 49% of the appellant's stock was to remain with Harold E. Smith and Raymond M. Curtis (who at present own an aggregate of 51%), but said 49% was to

6 placed in a voting trust, the voting trustee and the trust agreement to be first approved by the Commission. It was further proposed that all officers and directors in the appellant corporation would resign and would not be officers or directors in the reorganized corporation. This proposal was effectively calculated to insure that no person now or in the past having any voice or influence as officer, director or stockholder in the appellant corporation would have any control over or ability to influence the policies of the appellant corporation in the future, and to insure that the management, direction, and control of the corporation would be in the hands of persons whose qualifications were approved by the Commission. This petition, filed April 28, 1945, was denied on May 1, 1945, without opinion, by Order of the Commission.

Appellant has continued to operate Station WOKO subsequent to the expiration of its regular license therefor by virtue of temporary authorizations extended from time to time by the Commission. By Order of May 1, 1945, the Commission authorized the appellant to continue "operation of Station WOKO until further order of the Commission." The Order denying appellant's Petition for Rehearing contained a paragraph purporting to terminate this authorization effective May 31, 1945. On May 19, appellant filed a petition with the Commission requesting that it modify its Order denying the Petition for Rehearing so as to permit appellant to continue operating WOKO pending determination of this appeal or enter such other appropriate order having that effect.

REASONS FOR APPEAL

The Commission's decision from which this appeal is taken is erroneous and should be reversed for the following reasons:

1. The Commission's decision deleting Station WOKO is an unlawful attempt to impose sanctions, and constitutes an abuse of the Commission's licensing power.

7 2. The Commission erred in concluding that appellant cannot be entrusted with the responsibilities of a licensee, in the absence of any finding or any evidence upon which a finding could be predicated that appellant, its officers, directors, or stockholders, ever concealed or misrepresented a fact to the Commission, the disclosure of which would have been material in the sense that it would have affected the Commission's decision on any application in connection with which such alleged misrepresentation or concealment was made.

3. The Commission's refusal to renew appellant's license is erroneous because the record does not support a finding that a misrepresentation of any material fact was made by the appellant or any of its officers, stockholders, or directors.

4. The Commission's conclusion that the appellant cannot be entrusted with the responsibilities of a licensee does not follow from the basic findings made by the Commission, even assuming such findings may be accepted without regard to whether they are supported by substantial evidence.

5. The Commission erred in concluding that appellant could not be entrusted with the responsibilities of a licensee without considering and making findings concerning the manner in which appellant had operated its radio station over a period of more than twelve years.

6. The Commission erred in concluding that the public interest, convenience, or necessity would not be served by renewal of ap-

pellant's license in the absence of any finding that public interest, convenience, and necessity had not been served by appellant's operation of Radio Station WOKO in the past and in the face of uncontradicted record evidence requiring a finding that public interest, convenience, and necessity had been served by such operation.

7. The Commission erred in failing to find and conclude
8 that any misrepresentation, concealment, or failure to disclose the Pickard beneficial stock ownership was immaterial and that had disclosure of such ownership been made either at its inception or any time thereafter the existence of such ownership would have neither required nor justified a denial of any authorization requested by appellant.

8. The Commission erred in holding that any disclosure respecting the identity of beneficial minority stock ownership of a corporate applicant called for by Commission's application forms or regulations is *ipso facto* of such substance and importance that a failure to disclose such information, regardless of motive, purpose, or materiality under the Communications Act, justifies the conclusion that an applicant corporation may not be entrusted with a license to operate a radio broadcast station.

9. The Commission erred in failing to find and conclude that appellant is in all respects qualified to operate a radio broadcast station.

10. The Commission's conclusion that public interest, convenience, or necessity would not be served by a renewal of appellant's license to operate WOKO is contrary to law and in law is arbitrary and capricious.

11. The Commission erred in failing to adopt the proposed findings and conclusion submitted by appellant.

12. The Commission erred in denying appellant's Petition for Rehearing.

13. The Commission erred in failing to grant a further hearing for the purpose of considering the new facts and circumstances brought to the Commission's attention by said Petition for Rehearing.

14. The Commission erred, assuming arguendo that appellant with its present management and ownership is not qualified to operate WOKO, in refusing to permit appellant to reorganize so that its management and ownership would be in the hands of qualified persons approved by the Commission.

9 15. The Commission erred in refusing to modify its proposed findings in the manner requested by appellant in its exceptions thereto.

16. The Commission erred in failing to renew appellant's license to operate Station WOKO.

RELIEF REQUESTED

Appellant prays that this Court review the action of the Commission and upon such review to reverse the Commission's Orders of March 27, 1945, and May 1, 1945, and remand the matter to the Commission for further action in conformity to the applicable provisions of the Communications Act of 1934, as Amended, and the judgment of this Court.

Respectfully submitted.

WOKO, INCORPORATED,
By DEMPSEY AND KOPLOVITZ,
Its Attorneys.

By WILLIAM J. DEMPSEY,
938 Bowen Bldg., Washington, D. C.

May 21, 1945.

* * * * *

F. C. C. Form No. 303 (Revised Feb. 10, 1942).
File No. B1–R–253. Call Letters WOKO.

Before Federal Communications Commission

Application for renewal of standard broadcast station license

Submit in triplicate direct to the Federal Communications Commission, Washington, D. C. Swear to at least two copies.

Before executing application, see Communications Act of 1934, as amended, Part I (Rules of Practice and Procedure), Part III (Standard Broadcast Rules) and sec. 43.1 of the Commission's Rules and Regulations, and the Standards of Good Engineering Practice Concerning Standard Broadcast Stations.

To the Federal Communications Commission:

1. Name of applicant:[1] WOKO, Inc.
2. Post-office address: Street and number, 8 Elk Street; City, Albany; State, New York.
3. Is applicant a citizen of the United States? Corporation.
4. Is the applicant a representative of an alien or foreign government? No.
5. Give the file number and date of the license sought to be renewed: B1–R–253, issued July 28, 1942.
6. Operation authorized by the existing license and for which renewal of license is requested:
   (a) Frequency: 1460 kilocycles.
   (b) Power: (1) Night 500 watts. (2) Day 1000 watts.
   (c) Hours of operation: Unlimited.

(Should be stated exactly as in existing license. Time-sharing stations, limited time stations, and station rebroadcasting pro-

[1] Name of applicant must be identical with that shown in current license.

grams of others shall file documents as specified by sections 3.74, 3.80, and 3.408, subsection (b), footnote 3, Rules of Practice and Procedure, respectively.)

7. (a) Do the reports filed by applicant under sec. 1.361 of the Rules of Practice and Procedure reflect substantially applicant's status with regard to all conditions stated in such reports as of the date this application was executed?[2] (Answer yes or no) Yes.

(b) If not, submit a separate statement herewith showing changes.

(c) Has applicant filed the report and the necessary supplemental reports required by sec. 43.1 of the Rules? (Answer yes or no) Yes.

11 8. (a) Is applicant now, or has applicant been, party to a proceeding in any Federal court involving the monopolizing of, or the attempt to monopolize, radio communication, directly or indirectly, through control of the manufacture or sale of radio apparatus, by exclusive traffic arrangements, or by any other means, or of using unfair methods of competition? (Answer yes or no.) No.

(b) Is applicant directly or indirectly controlled by any person involved in such proceeding? (Answer yes or no.) No.

9. (a) In what respect, if any, does the apparatus, antenna, or technical operation differ from that described in the last application for license or renewal of license? (If none, so state.) None.

(b) If any changes whatsoever have been made in the fundamental audio or radio circuit of the transmitter or in the coupling and phasing equipment affecting the schematic diagram heretofore filed with the Commission, the applicant represents that there is attached an accurate corrected diagram. (If none, so state.) None.

10. Specify actual minimum periods during the regular broadcast day (6 a. m. to 12 midnight, local standard time) the station has been operated since the effective date of existing license:[3]

	Before 6 p. m.	After 6 p. m.	Total minimum hours daily
Sunday	7.30 a. m.–6.00 p. m.	6.00 p. m.–1.00 a. m.	17½
Monday	6.00 a. m.–6.00 p. m.	6.00 p. m.–1.00 a. m.	19
Tuesday	6.00 a. m.–6.00 p. m.	6.00 p. m.–1.00 a. m.	19
Wednesday	6.00 a. m.–6.00 p. m.	6.00 p. m.–1.00 a. m.	19
Thursday	6.00 a. m.–6.00 p. m.	6.00 p. m.–1.00 a. m.	19
Friday	6.00 a. m.–6.00 p. m.	6.00 p. m.–1.00 a. m.	19
Saturday	6.00 a. m.–6.00 p. m.	6.00 p. m.–1.00 a. m.	19

[2] Action upon this application will be held in abeyance, pending the filing of such reports, if delinquent.

[3] If minimum hours operated each day are not in compliance with sec. 3.71 of the Rules, attach hereto a statement of explanation.

12 11. Under existing license—

(a) State average number of hours per month devoted to commercial programs: 250.

(b) State average number of hours per month used in advertising any business (other than broadcasting) in which applicant is engaged either directly or indirectly. None.

(c) State average number of hours per month devoted to chain programs, specifying the network organization furnishing same:

Commercial programs: 229 hrs.

Sustaining programs: 167 hrs.

Furnished by Columbia Broadcasting System

(d) State the average percentage of time per month (combined total should equal 100 per cent) devoted to—

Commercial programs		*Sustaining programs*	
1. Entertainment	37.5	1. Entertainment	21.4
2. Educational		2. Educational	6.7
3. Religious		3. Religious	4.0
4. Agricultural		4. Agricultural	5.4
5. Civic [4]		5. Civic [4]	3.6
6. Governmental [5]		6. Governmental [5]	12.1
7. News	6.8	7. News	2.5
8.		8.	
9. Total	44.3	9. Total	55.7

[4] Include in this item fraternal, chamber of commerce, charitable, and other civic but nongovernmental programs.

[5] Include in this item all municipal, state, and federal programs, including political or controversial broadcasts by public officials, or candidates for public office, and regardless of whether or not the programs included under this item are entertainment, educational, agricultural, etc., in character.

12. (a) Are phonograph records used? Yes. If so, state average number of hours per month: 10.

(b) Are any other mechanical records (electrical transcriptions, etc.) used? Yes. If so, state average number of hours per month: 40.

13 13.[6] (a) Set forth fully any respects in which character of the program service proposed is different from that carried on under the existing license as reflected in your answer to section 11. Time devoted to civic and governmental programs increased, at the expense of entertainment. This trend will undoubtedly continue.

[6] Any document already on file with the Commission may be incorporated as part of this application by reference if accompanied by a statement that there has been no change therein since the date of filing, and provided that the reference is sufficiently complete by date of filing, number, and application in connection with which filed to permit identification.

(b) Attach copies of all contracts or give the substance of all understandings of a general nature affecting program service, including (1) chain broadcast contracts, (2) transcription service contracts, (3) bulk time sales contracts, and (4) contracts or understandings which confer upon persons other than the licensee (or employees thereof entirely under the direction of the licensee) any power or authority with respect to the selection or production of programs or the sale of time, even though ultimate determination with respect to such matters is retained by the licensee. Exhibit A, attached.

14.[6] Set forth in an exhibit the name, address, citizenship and experience of each employee of the station having any responsibilities in connection with the technical operation or with programs, showing the position and duties of each. On file, Exhibit C. File No. B1–R–253, application for renewal of license, filed April 29, 1941; no change in executive staff and only minor changes in remainder of staff since filing.

15. Applicant's last application for station license is to be considered as part of this application and the truth of the statements therein contained is hereby reaffirmed, except insofar as the contrary expressly appears herein, and in the following particulars. None.

16. Applicant waives any claim to the use of any particular frequency, or of the ether, as against the regulatory power of the United States, because of the previous use of the same, whether by license or otherwise, and requests a renewal of its existing license in accordance with this application.

Dated this 28th day of September 1942.

WOKO, INC.
(Must correspond with item 1) *Applicant.*
By HAROLD E. SMITH,
Sec'y-Treas. (Official.)

(Be sure all necessary information is furnished and all questions are fully answered. If any portions of the application are not applicable, specifically so state, and show reasons therefor. Defective applications may be returned without consideration.—section 1.72, Rules of Practice and Procedure.)

STATE OF NEW YORK,
County of Albany, ss:

(sworn upon his oath.

Harold E. Smith, being first duly (affirmed according to law, deposes and says that he is the Secretary-Treasurer of the above-named applicant, and that the facts stated in the foregoing application, and all exhibits attached thereto, are true of his own

See footnote 6 on p. 9.

knowledge, except as to such statements as are therein stated on information and belief, and as to such statements he believes them to be true.

HAROLD E. SMITH,
Affiant.[1]

Subscribed and sworn to before me this 28th day of September, 1942.

[SEAL] DEUEL RICHARDSON,
Notary public.

(Notary public's seal must be affixed where law of jurisdiction requires, otherwise state law does not require seal.)
My commission expires March 30, 1943.

15 *Exhibit "A" to application*

1. Contract with Columbia Broadcasting System last filed with Form No. 335, accompanying application for renewal of license filed April 29, 1941, File No. B1–R–253.

2. Substance of transcription service contract: Contract between WOKO, Inc., and Standard Radio Inc., made June 11, 1940, for a two-year period with automatic one-year renewals, provides for Standard to furnish station with a program library service, with a basic library of 2,000 musical selections and monthly releases of at least 20 additional musical selections, plus cabinets and card index system, at a regular monthly rental. There is no restriction on the use of this library, except that station is responsible for performing rights licenses and is required to pay music royalty fees on programs for regional and national advertisers. No royalty fees are required for local advertisers' programs and for sustaining programs. WOKO, Inc., is privileged to sublease the use of the library to Station WABY. The contract is to be deemed renewed for further periods of one year each under the same terms and conditions unless either party shall have given notice to the other of its intention to terminate sixty days before the end of any contract period.

3. No bulk time sales contract has ever been accepted or negotiated by WOKO, Inc.

4. No other contracts, agreements or understandings exist affecting the control of programs or sale of time.

F. C. C. Form No. 303 (revised Feb. 10, 1942).
File No. B1–R–253. Call Letters WOKO.

[1] Must be subscribed and verified by party applicant, by one of the parties if more than one, by an officer if applicant is a corporation, or by attorney of applicant only under the provisions of section 1.121 which must be fully explained.

Before Federal Communications Commission

Application for renewal of standard broadcast station license

Submit in triplicate direct to the Federal Communications Commission, Washington, D. C. Swear to at least two copies.

16 Before executing application, see Communications Act of 1934, as amended, Part I (Rules of Practice and Procedure), Part III (Standard Broadcast Rules) and sec. 43.1 of the Commission's Rules and Regulations, and the Standards of Good Engineering Practice Concerning Standard Broadcast Stations.

To the Federal Communications Commission:

1. Name of applicant:[1] WOKO, Inc.

2. Post-office address: Street and number, 8 Elk Street; City, Albany; State, New York.

3. Is applicant a citizen of the United States? Corporation.

4. Is the applicant a representative of an alien or foreign government? No.

5. Give the file number and date of the license sought to be renewed: B1–R–253, issued July 28, 1942.

6. Operation authorized by the existing license and for which renewal of license is requested:

(a) Frequency, 1460 kilocycles.

(b) Power: (1) Night 500 watts. (2) Day 1,000 watts.

(c) Hours of operation: auxiliary transmitter for emergency use only.

(Should be stated exactly as in existing license. Time-sharing stations, limited time stations, and stations rebroadcasting programs of others shall file documents as specified by sections 3.74, 3.80, and 3.408, subsection (b), footnote 3, Rules of Practice and Procedure, respectively.)

7. (a) Do the reports filed by applicant under sec. 1.361 of the Rules of Practice and Procedure reflect substantially applicant's status with regard to all conditions stated in such reports as of the date this application was executed?[2] (Answer yes or no.) Yes.

(b) If not, submit a separate statement herewith showing changes.

17 (c) Has applicant filed the report and the necessary supplemental reports required by sec. 43.1 of the Rules? (Answer yes or no) Yes.

---

[1] Name of applicant must be identical with that shown in current license.

[2] Action upon this application will be held in abeyance, pending the filing of such reports, if delinquent.

8. (a) Is applicant now, or has applicant been, party to a proceeding in any Federal court involving the monopolizing of, or the attempt to monopolize, radio communication, directly or indirectly, through control of the manufacture or sale of radio apparatus, by exclusive traffic arrangements, or by any other means, or of using unfair methods of competition? (Answer yes or no) No.

(b) Is applicant directly or indirectly controlled by any person involved in such proceeding? (Answer yes or no) No.

9. (a) In what respect, if any, does the apparatus, antenna, or technical operation differ from that described in the last application for license or renewal of license? (If none, so state) None.

(b) If any changes whatsoever have been made in the fundamental audio or radio circuit of the transmitter or in the coupling and phasing equipment affecting the schematic diagram heretofore filed with the Commission, the applicant represents that there is attached an accurate corrected diagram. (If none, so state) None.

10. Specify actual minimum periods during the regular broadcast day (6 a. m. to 12 midnight, local standard time) the station has been operated since the effective date of existing license: [3]

	Before 6 p. m.	After 6 p. m.	Total minimum hours daily
Sunday	7.30 a. m.-6.00 p. m	6.00 p. m.-1.00 a. m	17½
Monday	6.00 a. m.-6.00 p. m	6.00 p. m.-1.00 a. m	19
Tuesday	6.00 a. m.-6.00 p. m	6.00 p. m.-1.00 a. m	19
Wednesday	6.00 a. m.-6.00 p. m	6.00 p. m.-1.00 a. m	19
Thursday	6.00 a. m.-6.00 p. m	6.00 p. m.-1.00 a. m	19
Friday	6.00 a. m.-6.00 p. m	6.00 p. m.-1.00 a. m	19
Saturday	6.00 a. m.-6.00 p. m	6.00 p. m.-1.00 a. m	19

18 . 11. Under existing license—

(a) State average number of hours per month devoted to commercial programs: 250.

(b) State average number of hours per month used in advertising any business (other than broadcasting) in which applicant is engaged either directly or indirectly: None.

(c) State average number of hours per month devoted to chain programs, specifying the network organization furnishing same:

Commercial programs 229 hrs.

Sustaining programs 167 hrs.

[3] If minimum hours operated each day are not in compliance with sec. 3.71 of the Rules, attach hereto a statement of explanation.

Furnished by Columbia Broadcasting System

(d) State the average percentage of time per month (combined total should equal 100 percent) devoted to—

	Commercial programs		*Sustaining programs*	
1.	Entertainment	37.5	Entertainment	21.4
2.	Educational		Educational	6.7
3.	Religious		Religious	4.0
4.	Agricultural		Agricultural	5.4
5.	Civic[4]		Civic[4]	3.6
6.	Governmental[5]		Governmental[5]	12.1
7.	News	6.8	News	2.5
8.				
9.	Total	44.3	Total	55.7

[4] Include in this item fraternal, chamber of commerce, charitable, and other civic but nongovernmental programs.

[5] Include in this item all municipal, state, and federal programs, including political or controversial broadcasts by public officials, or candidates for public office, and regardless of whether or not the programs included under this item are entertainment, educational, agricultural, etc., in character.

12. (a) Are phonograph records used? Yes. If so, state average number of hours per month: 10.

(b) Are any other mechanical records (electrical transcriptions, etc.) used? Yes. If so, state average number of hours per month: 40.

19 13.[6] (a) Set forth fully any respects in which the character of the program service proposed is different from that carried on under the existing license as reflected in your answer to section 11. Time devoted to civic and governmental programs increased, at the expense of entertainment. This trend will undoubtedly continue.

(b) Attach copies of all contracts or give the substance of all understandings of a general nature affecting program service, including (1) chain broadcast contracts, (2) transcription service contracts, (3) bulk time sales contracts, and (4) contracts or understandings which confer upon persons other than the licensee (or employees thereof entirely under the direction of the licensee) any power or authority with respect to the selection or production of programs or the sale of time, even though ultimate determination with respect to such matters is retained by the licensee. Exhibit A, attached.

14.[6] Set forth in an exhibit the name, address, citizenship and experience of each employee of the station having any responsibili-

[6] Any document already on file with the Commission may be incorporated as part of this application by reference if accompanied by a statement that there has been no change therein since the date of filing, and provided that the reference is sufficiently complete by date of filing, file number and application in connection with which filed, to permit identification.

ties in connection with the technical operation or with programs, showing the position and duties of each. On file, Exhibit C. File No. B1–R–253, application for renewal of license, filed April 29, 1941; no change in executive staff and only minor changes in remainder of staff since filing.

15. Applicant's last application for station license is to be considered as part of this application and the truth of the statements therein contained is hereby reaffirmed, except insofar as the contrary expressly appears herein, and in the following particulars. None.

16. Applicant waives any claim to the use of any particular frequency, or of the ether, as against the regulatory power of the United States, because of the previous use of the same, whether by license or otherwise, and requests a renewal of its existing license in accordance with this application.

Dated this 28th day of September 1942.

WOKO, INC.,
(Must correspond with item 1) *Applicant.*
By HAROLD E. SMITH,
Sec'y-Treas. (Official).

(Be sure all necessary information is furnished and all questions are fully answered. If any portions of the application are not applicable, specifically so state, and show reasons therefor. Defective applications may be returned without consideration.—section 1.72, Rules of Practice and Procedure.)

STATE OF NEW YORK,
County of Albany, ss:

(sworn upon his oath,

Harold E. Smith, being first duly (affirmed according to law, deposes and says that he is the Secretary-Treasurer of the above-named applicant, and that the facts stated in the foregoing application, and all exhibits attached thereto, are true of his own knowledge, except as to such statements as are therein stated on information and belief, and as to such statements he believes them to be true.

HAROLD E. SMITH.
Affiant.[1]

Subscribed and sworn to before me this 28th day of September 1942.

[SEAL]

DEUEL RICHARDSON,
Notary public.

[1] Must be subscribed and verified by party applicant, by one of the parties if more than one, by an officer if applicant is a corporation, or by attorney of applicant only under the provisions of section 1.121 which must be fully explained.

21 (Notary public's seal must be affixed where law of jurisdiction requires, otherwise state that law does not require seal.)

My commission expires March 30, 1943.

Before Federal Communications Commission

F. C. C. Form 335—May 1941. Call letters WOKO.

Supplement concerning chain broadcasting to application for standard broadcast authorization

(Submit in triplicate to Federal Communications Commission, Washington, D. C. Swear to at least two copies.)

1. Name of applicant: WOKO, Inc.

Post office address: Street and number, 8 Elk Street; City, Albany; State, New York.

2. Give date and file number of each application pending before the Federal Communications Commission.

Application—Modify C. P. for new frequency and power. Date—June 27, 1941. File No.—B1–P–3238.

Application—Renewal of license, WOKO. Date—September 28, 1942. File No.—B1–R–253.

3. Specify which of the foregoing applications this form is submitted to supplement—Renewal of license, B1–R–253.

4. (a) Has applicant any contract, arrangement or understanding, express or implied, with a network organization or the broadcasting of chain programs? Yes.

(b) Does applicant, in the event the application supplemented by this form is granted, propose to broadcast network programs? Yes.

(If applicant, prior to being notified of Commission action on the application supplemented by this form, changes his proposal with respect to broadcasting network programs or
22 enters into any arrangement or any change in arrangement with a network organization for the broadcasting of chain programs, F. C. C. Form 335 must be filed as an additional supplement to the application.)

* * * * *

5. If network programs are to be broadcast, state arrangements under which they are to be obtained and attached copies of any contractual arrangement which may have been made. If the arrangement is based on an oral understanding, a written statement of the arrangement should be admitted.[1] Copy of contract

[1] If any of the documents required to be furnished under this paragraph are already on file with the Federal Communications Commission, in lieu of refiling same, the applicant may incorporate same herein by reference, provided that such reference must include: (1) the date of filing; (2) identification of the requirement of the

with Columbia Broadcasting System last filed with Form No. 335, accompanying application for renewal of license filed April 29, 1941, File No. B1–R–253; no change. Standard CBS network contract, made June 10, 1940, signed by H. V. Akerberg, Vice-Pres. for CBS, and Harold E. Smith, Sec'y-Treas. for WOKO, Inc.

Dated this 28th day of September 1942.

WOKO, INC.,
(Must correspond with item 1) *Applicant.*
By HAROLD E. SMITH,
Sec'y-Treas. (Official.)

STATE OF NEW YORK,
County of Albany, ss:

Harold E. Smith being first duly (sworn upon his oath, affirmed according to law), deposes and says that he is the Secretary-Treasurer of the above-named applicant, and (if applicant is not an individual, state relation of affiant to applicant)
23 that the facts given in the foregoing statement, and all exhibits attached thereto, are true of his own knowledge, except as to such statements as are therein stated on information and belief, and as to such statements he believes them to be true and that the information submitted herein is full and complete.

HAROLD E. SMITH,
Affiant.[2]

Subscribed and sworn to before me this 28th day of September 1942.

[SEAL]. DEUEL RICHARDSON,
Notary Public.

(Notary public's seal must be affixed where few of jurisdiction requires, otherwise state that law does not require seal.)
My commission expires March 30, 1943.

Before Federal Communications Commission, Washington, D. C.

Notice of designation for hearing of application for renewal of license

Docket No. 6486. File No. B1–R–253

In re application of WOKO, Incorporated (WOKO).
Dated: September 28, 1942.

Federal Communications Commission pursuant to which it was filed (i. e., Rule No., Order No., or name and date of application form) and (3) a clear identification of the document referred to showing: (a) its character (i. e., affidavit, letter, contract, or report); (b) date the instrument was written or executed; (c) the name or names of the affiant, writer and contracting parties; and (d) a brief summary of the content or subject of such instrument.

[2] Must be subscribed and verified by party applicant, by one of the parties if more than one, by an officer if applicant is a corporation, or by attorney of applicant only under the provisions of section 1.121 which must be fully explained.

For: Renewal of License (Main & Auxiliary).
Class of Service: Broadcast.
Class of Station: Broadcast.
Location: Albany, New York.
Operating Assignment Specified.
24 Frequency: 1460 kc.
Power: 500 w. night; 1 kw. day.
Auxiliary: 500 w. night and day.
Hours of Operation: Unlimited.

You are hereby notified that the Commission has examined the above-described application and has designated the matter for hearing for the following reasons:

1. To determine whether the representations and statements made to the Commission or its predecessors, the Federal Radio Commission, by the licensee, its officers, directors, stockholders, or agents, with respect to the ownership or transfer of, subscription to, or consideration paid for the stock of WOKO, Inc., truly and accurately reflect the facts.

2. To determine all the circumstances and conditions under which the stock of WOKO, Inc., has been issued, transferred or assigned.

3. To determine whether or not the applicant is qualified to continue the operation of Station WOKO.

4. To determine whether, in view of the facts adduced under the foregoing issues, public interest, convenience and necessity would be served by a grant of this application.

The application involved herein will not be granted by the Commission unless the issues listed above are determined in favor of the applicant on the basis of a record duly and properly made by means of a formal hearing.

The applicant is hereby given the opportunity to obtain a hearing on such issues by filing a written appearance in accordance with the provisions of Section 1.382 (b) of the Commission's Rules of Practice and Procedure. Persons other than the applicant who desire to be heard must file a petition to intervene in accordance with the provisions of Section 1.102 of the Commission's Rules of Practice and Procedure.

25 The applicant's address is as follows:

WOKO, Incorporated,
Radio Station WOKO,
Radio Center, 8 Elk Street,
Albany, New York.

Dated at Washington, D. C. Jan. 26, 1943.

By the Commission,

T. J. SLOWIE,
Secretary.

Copies mailed to: Applicant—Geo. O. Sutton, 1030 National Press Bldg. One copy to Lillian Watson for Fed. Reg.

Rules referred to in attached Notice

Section 1.382. (b) In order to avail himself of the opportunity to be heard, the applicant, in person or by his attorney, shall, within 15 days of the mailing of the notice of designation for hearing by the Secretary, file with the Commission a written appearance stating that he will appear and present evidence on the issues specified in the statement of reasons furnished by the Commission on such date as may be fixed for the hearing. In cases other than standard broadcast, high frequency broadcast, international broadcast and television, the applicant will accompany his appearance with an additional copy of his application and supporting documents.

Section 1.102 Intervention. Petitions for intervention must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, the facts on which the petitioner bases his claim that his intervention will be in the public interest and must be subscribed and verified in accordance with Sec. 1.122. The granting of a petition to intervene shall have the effect of permitting intervention before the Commission but shall not be considered as any recognition of any legal or equitable right or interest in the proceeding. The granting of such petition shall not have the effect of changing or enlarging the issues which shall be those specified in the Commission's notice of hearing unless on motion the Commission shall amend the same.

Section 1.122 Pleadings. All pleadings (not including applications or amendments thereto) filed by any party represented by an attorney, shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign and verify his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings signed by the attorney for a party need not be verified or accompanied by affidavit. The signature of an attorney constitutes a certificate by him that he has read the pleadings; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the matter may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to

appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

* * * * *

Before Federal Communications Commission

Notice of appearance and statement of facts

Comes now the applicant above-named and states that it will appear and desires to be heard in connection with the above-entitled application for renewal of license and that it expects to prove the following facts at the hearing thereon.

1. That the representations and statements made to the Commission or its predecessors, the Federal Radio Commission, by the licensee, its officers, directors, stockholders, or agents, with respect to the ownership or transfer of, subscription to, or consideration paid for the stock of WOKO, Inc., truly and accurately reflect the facts.

27 2. That it will truly and accurately present all the circumstances and conditions under which the stock of WOKO, Inc., had been issued, transferred or assigned.

3. That the applicant is qualified to continue the operation of Station WOKO.

4. That public interest, convenience and necessity would be served by a grant of this application.

Respectfully submitted.

WOKO, Inc.
HAROLD E. SMITH.

The applicant's address is as follows:
WOKO, Inc.,
Radio Station WOKO,
Radio Centre, 8 Elk Street,
Albany, New York.

* * * * *

Before Federal Communications Commission

Petition to amend and enlarge the issues

Comes now WOKO, Incorporated, licensee of Radio Station WOKO, Albany, New York, by its attorney, George O. Sutton, and requests that the Notice of Hearing in the above-styled docket case issued by the Commission under date of January 26, 1943, be amended and enlarged to include the following issues, or issues similar in substance thereto:

1. To determine the nature, character and extent of the program service rendered by Station WOKO in the past, as well as that which is proposed to be rendered in the future.

2. To determine the nature, character and extent of the activities and/or policies of the licensee, its officers, directors, stockholders, agents, and/or employees, with respect to the operation of the station, the public service rendered thereby, and the response of the public to such activities and/or service in the past, and the proposals for future policies, activities and operation.

28 In support of this request to amend and enlarge the issues, it is respectfully shown unto the Commission:

1. That the Commission by its action in designating the above-styled application for hearing questions whether or not the operation of Station WOKO has served and will continue to serve the public interest, convenience and necessity.

2. That it is not clear to the petitioner, based upon the issues set out in the Notice of Hearing, whether the Commission is attempting to make a determination that the future operation of the station will or will not be in and serve the public interest, convenience and necessity, without affording petitioner an opportunity to show the program and public service that has been rendered in the past by Station WOKO and that which it proposes for the future; hence, this request to include specific issues which will permit introduction of evidence bearing on this subject.

3. That petitioner herein believes that in order for the Commission to make a determination as to whether the continued operation of Station WOKO will serve the public interest, convenience and necessity, the Commission must not only take into account the past activities of the officers, directors, stockholders or agents of the licensee corporation, but must also consider the program and public service that has been rendered by the station, and that which is proposed to be rendered by it in the future. The activities and/or policies to be pursued in the future by the licensee and by its officers, directors, stockholders, agents, and/or employees are just as important as those in the past. The program service which is broadcast by a station and the public response thereto is the essence of any consideration and determination by the Commission as to what will or will not serve the public interest, convenience and necessity. The program service of a station cannot be overlooked or bypassed. The Communications Act of 1934 requires that the Commission

29 take into account numerous factors, such as the legal, technical and other qualifications of the applicant, including the programs that have been broadcast in the past, as well as those to be broadcast in the future, before it reaches the legal conclusion that the granting or denial of an application will serve the

public interest, convenience and necessity. This yardstick may not be so restricted as to make the phrase meaningless, or to deprive the applicant of making a proper showing that even though one or more of its officers, directors or stockholders may have been misguided or made mistakes, nevertheless, the program service it has rendered has served public interest, convenience and necessity, and its plans and policies for the future operation of the station will continue to serve the public interest, convenience and necessity. Not only have the courts enunciated such principles and doctrines, but the Commission itself has followed such a policy in the past.

Wherefore, it is respectfully prayed that the Commission amend and enlarge the Notice of Hearing in Docket No. 6486, File No. B1–R–253, dated January 26, 1943, to include the following issues, or issues similar in substance thereto:

1. To determine the nature, character and extent of the program service rendered by Station WOKO in the past, as well as that which is proposed to be rendered in the future.

2. To determine the nature, character and extent of the activities and/or policies of the licensee, its officers, directors, stockholders, agents, and/or employees, with respect to the operation of the station, the public service rendered thereby, and the response of the public to such activities and/or service in the past, and the proposals for future policies, activities and operation.

Respectfully submitted.

WOKO, INCORPORATED,
By GEO. O. SUITON,
Its Attorney,
1030 National Press Building, Washington, D. C.

JUNE 26, 1943.

* * * * *

30 Before Federal Communications Commission

Order

(June 30, 1943)

The Commission having under consideration the petition of WOKO, Inc., for leave to amend and enlarge the hearing issues as now designated on the above-entitled application, and

It Appearing that the hearing issues now designated by the Commission are broad enough to permit, within reasonable bounds, the introduction of the evidence suggested by the proposed issues of the petitioner, and that the requested amendment and enlargement of the hearing issues is therefore unnecessary.

It is Ordered, This 30th day of June, 1943, that the petition Be, and the Same Is Hereby, Denied.

By the Commission, Paul A. Walker, Commissioner.

T. J. SLOWIE,
Secretary.

Before Federal Communications Commission

Proposed findings of fact and conclusions

Findings of fact

1. This proceeding arose upon the application of WOKO, Inc., hereinafter referred to as the applicant, for renewal of license, for the operation of Station WOKO, Albany, New York. Said application was designated for hearing and heard on July 1, 2, 3, 5, and 22, August 3, September 20, 21, and 22, 1943, to secure evidence on the following issues which were set forth in the notice of hearing:

(1) To determine whether the representations and statements made to the Commission or its predecessor, the Federal Radio Commission, by the licensee, its officers, directors, stockholders, or agents, with respect to the ownership or transfer of, subscription to, or consideration paid for the stock of WOKO, Inc., truly and accurately reflect the facts.

(2) To determine all the circumstances and conditions under which the stock WOKO, Inc., has been issued, transferred or assigned.

(3) To determine whether or not the applicant is qualified to continue the operation of Station WOKO.

(4) To determine whether, in view of the facts adduced under the foregoing issues, public interest, convenience and necessity would be served by a grant of this application.

2. The applicant is a New York corporation authorized to issue 1,000 shares of no par value common voting stock. The record holders of such stock and the officers and directors of the corporation at the date of the hearing were:

	Shares	Percent
Harold E. Smith, Sec.-Treas., Dir. & General Manager	255	25½
Raymond M. Curtis, Pres. & Dir.	255	25½
The Press Company, Inc.	250	25
R. K. Phelps	240	24
Deuel Richardson, V. Pres. & Assistant Manager	---	---

3. The principal stockholders in the applicant corporation are also stockholders in The Adirondack Broadcasting Company, Inc., a New York corporation, licensee of Station WABY, Albany, New

York. Said corporation is authorized to issue 200 shares of common voting stock. The distribution thereof and the officers and directors of said corporation as shown by records of the Commission at the date of this hearing were:

	Shares	Percent
Harold E. Smith, Pres., Treas. & Dir	52½	26¼
Raymond M. Curtis, V. Pres. & Dir	52½	26¼
The Press Company, Inc	30	15
O. T. Griffin, Director	15	7½
Rensselaer Polytechnic Institute of Troy	50	25
A. J. McDonald, Sec. & Dir	----	----

4. The offices of applicant corporation and the licensee of Station WABY are located in the same building which is owned by the applicant corporation. The business offices of the two stations are located in the same room; the same department conducts sales for both stations; the studio manager, the woman's program editor, and the orchestra leader and musicians are shared by both stations.

32 5. Station WOKO was formerly located at Poughkeepsie, New York, and was licensed to the Hudson Valley Broadcasting Company, a copartnership composed of Harold E. Smith and Raymond M. Curtis. It shared time with Stations WHEC, WHEB, and WHCS and had no network affiliation. On November 25, 1930, an application was granted to move the station to Albany, New York, and operation in that city was authorized on April 17, 1931, Special Experimental Authority for unlimited time operation of Station WOKO was granted March 24, 1931, and by successive extensions this authority was continued to May 1, 1934, when the station was licensed on a regular basis for such operation.

6. The operation of Station WOKO at Poughkeepsie was a losing venture. Mr. Curtis was unwilling to continue paying his portion of the losses and suggested that the station license be surrendered which Mr. Smith was unwilling to do, and he decided to investigate the possibility of securing a network affiliation. In furtherance of this idea, he went to New York the latter part of 1929, where he interviewed Mr. Sam Pickard, Vice-President in charge of station relations of the Columbia Broadcasting System (hereinafter referred to as Columbia), and made known the desire to secure an affiliation with Columbia for Station WOKO. Mr. Pickard advised him that Columbia would not be interested in said affiliation as long as the station was located at Poughkeepsie and suggested its removal to Albany, and the possibility of securing unlimited time. He stated that if this were done, Columbia would be interested in having Station WOKO as an affiliate.

7. Mr. Smith was not financially able to carry out the suggestions made by Mr. Pickard relative to moving the station to Albany and Mr. Curtis was unwilling to finance the suggested move Therefore, with a view of carrying out Mr. Pickard's suggestions,

Mr. Smith went to Albany and had a conference with Arthur D. Hecox, managing editor and treasurer of The Press Com-
33 pany, Inc. (hereinafter referred to as The Press), newspaper publishers, concerning the contemplated removal of Station WOKO to Albany, financial assistance for such move, and arrangement whereby The Press might secure an interest in the station. During this conference, Mr. Hecox was informed of the conference with Mr. Pickard relative to possible Columbia affiliation and unlimited time operation.

8. Shortly after the conference, referred to above, Mr. Pickard wrote a letter to Mr. O'Neil, Vice-President of the United Hotel Corporation, concerning the possibility of securing studio space for Station WOKO in the Hotel Ten Eyck at Albany, and thereafter, Mr. Smith, with the knowledge of Mr. Curtis, called upon Mr. O'Neil relative thereto. An agreement was reached whereby studio space would be furnished in return for certain broadcast announcements relative the the hotel.

9. A second conference was held in Albany which was attended by Mr. Smith, Mr. Curtis, Mr. Hecox and Mr. Riley, attorney for The Press, at which the question of finances and the possibility of The Press securing an interest in Station WOKO were discussed. The parties tentatively agreed that a corporation to operate Station WOKO be formed with a capital stock of 1,000 shares; that 250 shares of said stock be held in the treasury; that The Press be given an option for one year to purchase the same; that the remaining 750 shares be issued in equal amounts to Mr. Smith and Mr. Curtis; that the proposed corporation arrange to borrow $30,000 (later increased to $35,000) at the National Commercial Bank and Trust Company, Albany, New York, on a note of the proposed corporation, to be endorsed by The Press; and that the stock of Mr. Smith and Mr. Curtis be held by it as collateral security for its endorsement.

10. There followed other conferences to complete the proposed transaction, and Mr. Pickard was kept fully advised by Mr. Smith concerning all matters relating to the proposed move
34 of Station WOKO to Albany. Following the tentative agreement, referred to above, Mr. Smith received a preliminary contract dated August 12, 1930, signed by Mr. Pickard as Vice-President of Columbia, in which it was stated that Columbia service would be made available to Station WOKO, if and when it were moved to Albany.

11. At one of the many conferences held between Mr. Smith and Mr. Pickard concerning the proposed removal of Station WOKO to Albany, Mr. Pickard stated that he would like to have a 25% interest in the station or the proposed corporation. Mr. Smith would not agree to give Mr. Pickard such interest as he and Mr.

Curtis would have only 75% interest in the proposed corporation, and if they gave him a 25% interest, they would lose control thereof, which they were unwilling to do. It was finally agreed that Mr. Pickard would be given a 24% (240 shares) stock interest in the proposed corporation, and that Mr. Pickard would help to secure Columbia affiliation for Station WOKO, furnish, without charge, experienced Columbia engineers to construct the station at Albany, supply a grand piano, and also supply newspaper publicity when the station was opened at Albany. Mr. Pickard was told that said stock would have to be deposited with The Press as collateral for the proposed bank loan. Thus the stock of the proposed corporation, if any when chartered, would be distributed as follows: Mr. Pickard, 24%; The Press, an option for 25%; Mr. Smith, 25½%; and Mr. Curtis 25½%.

12. The Columbia affiliation for Station WOKO was secured and the services of its engineers promised by Mr. Pickard were supplied. When the station was ready to commence operation at Albany, Mr. Pickard caused an advertisement thereof, which cost approximately $1,000, to be published in the Albany Evening News. However, said advertisement was charged to WOKO, Inc. Thereafter Mr. Pickard stated that if WOKO, Inc., would pay this bill, he would give the corporation a $1,500 grand piano, and the matter was so adjusted. Mr. Pickard suggested that the 24% (240 shares) stock interest, which had been promised to him, be issued, 14% to himself and 10% to Lawrence Lowman, another Vice-President of Columbia. All of the dealings concerning this stock were between Mr. Smith and Mr. Pickard.

13. On December 3, 1930, a contract was entered into between The Press and the Hudson Valley Broadcasting Company which embodied the tentative agreement reached between the parties, heretofore referred to. This contract was superseded by one executed on January 15, 1931, by The Press and WOKO, Inc. The latter had been incorporated on December 9, 1930, and authorized to issue 1,000 shares of no par value voting stock. Mr. Smith, Mr. Curtis and Mr. Hecox were the incorporators and also the first directors. Mr. Smith and Mr. Curtis were issued 750 shares (75%) of such stock in equal amounts and 250 shares (25%) were retained in the corporate treasury, subject to the option held by The Press.

14. The 240 shares of stock in WOKO, Inc., transferred to Mr. Pickard, have been issued and reissued on various dates and to various persons, all of which, together with the stock issued to other stockholders and also the stockholders of record as of the date of hearing, are shown as follows:

37 15. The certificates representing the stock (240 shares) in WOKO, Inc., which had been promised to Mr. Pickard were not originally issued in his name and that of Mr. Lowman, because Mr. Smith wanted some assurance that Mr. Pickard would carry out his promise to secure a Columbia affiliation for Station WOKO. Consequently, said stock was, as shown by the foregoing chart, issued as follows:

16. Certificates Nos. 2 and 3 to Mr. Curtis, and Nos. 5 and 6, to Mr. Smith for a total of 240 shares, were endorsed over to Mr. Pickard and Mr. Lowman, 140 shares to the former and 100 shares to the latter as Mr. Pickard wanted some evidence that the promise to give them such stock would be redeemed. This stock was thereafter deposited with The Press as collateral security for its endorsement on the WOKO, Inc., note for $35,000. Thereafter, in order to give Mr. Pickard further assurance that such promise would be redeemed, Certificates Nos. 7 and 9, each for 70 shares, were issued to him and Nos. 8 and 10, each for 50 shares, were issued to Mr. Lowman. These certificates were endorsed to Francke P. Pickard by Messrs. Pickard and Lowman, and thereafter delivered by Mr. Smith to The Press to be held as collateral in lieu of the original certificates.

17. When the applicant corporation paid the note on which The Press was an endorser, all of the stock of the applicant held by it (750 shares) was released and delivered to the record holders as follows: Mr. Curtis, 255 shares; Mr. Smith, 255 shares; Mr. Pickard, 140 shares; and Mr. Lowman, 100 shares. The stock so held by Mr. Pickard and Mr. Lowman was transferred by them to Francke Pickard. Certificates Nos. 7, 8, 9, and 10 were surrendered, and Certificate No. 13 for 240 shares was issued to Mrs. Pickard. On January 30, 1933, Mrs. Pickard endorsed said certificates to Harold E. Smith in compliance with an agreement made between Mr. Pickard and Mr. Smith that he would hold said stock for the Pickards, and on February 2, 1933, said
38 certificate was surrendered and Certificate No. 14 for 240 shares was issued in the name of Harold E. Smith. On the same date, he endorsed said certificate in blank and forwarded it to Mr. Pickard. Mr. Smith continued as record holder of said stock from February 2, 1933, to June 18, 1934, when Certificate No. 14 was surrendered, and on instruction from Mr. Pickard, Certificates Nos. 15, 16, and 17, for 80 shares each, were issued to Francke Pickard, Esspick Corporation and Sampick Corporation, respectively. On July 2, 1934, Certificates Nos. 15, 16, and 17 were surrendered, and Certificate No. 18 for 240 shares was issued in the name of R. K. Phelps.

18. It is the contention of the applicant, through Mr. Smith, that when said Certificate No. 18 for 240 shares of stock in the

applicant was issued in the name of Mr. Phelps that Mr. Pickard stated that such stock was being given to Mr. Phelps; that the officers and agents of the applicant did not know that the Pickards were the beneficial owners thereof, and therefore could not report that fact to the Commission; that when said certificate was issued it was mailed to Mr. Pickard and thereafter business reports, notices of corporate meetings, correspondence relating to said stock, and dividends thereon, with exceptions which will be noted below, were mailed to Mr. Phelps in care of Mr. Pickard as he was considered to be "business manager" for Mr. Phelps. In considering such contention, the testimony of Mr. Smith in support thereof, and the probative value, if any, to be accorded thereto, the facts set forth below should be considered.

19. All dividend checks issued on the 240 shares of stock in the applicant corporation originally promised to be transferred to Mr. Pickard and which has been represented at various times by certificates issued to Mr. Pickard, Mr. Lowman, Mrs. Pickard, the Esspick Corporation, the Sampick Corporation, and Harold E. Smith, and now represented by Certificate No. 18 issued in the name of R. K. Phelps, as heretofore shown, have been
39 received by, and deposited to the credit of Mr. or Mrs. Pickard. All such checks were mailed in accordance with the instructions noted above except one dated July 1, 1935, which was received at the Phelps' residence by Mrs. Phelps who endorsed thereon the name of R. K. Phelps, without his knowledge or consent, and mailed it to Mrs. Pickard with the request that no other such checks be forwarded to Mr. Phelps, and another dated July 11, 1942, which was mailed to Mr. Phelps at the direction of Mr. Pickard, and which upon its being received at the residence of Mr. Phelps was mailed without endorsement by Mrs. Phelps to Mrs. Pickard. The direction of Mr. Pickard to mail said check to Mr. Phelps was issued shortly before his appearance as a witness in Docket No. 5903, in re Station WGST, at which he was questioned concerning his radio interests.

20. With the exception of the check dated July 1, 1935, noted above, and one dated January 3, 1935, hereinafter referred to, all checks for dividends, fourteen (14) in number, on the stock recorded in the name of R. K. Phelps, have been received by Mrs. Pickard who endorsed thereon, without his knowledge or consent, the name of R. K. Phelps as well as her name, and deposited the same to the credit of herself or Mr. Pickard. Such endorsements so made of the name of R. K. Phelps and her name were made in a different style of handwriting.

21. Certificate No. 18, referred to above, was mailed to Mr. Pickard, who in turn mailed it to Mr. Phelps on or about September 22, 1934. It was retained by him until October 20, 1934, when

it was endorsed in blank, at the request of Mr. Pickard and returned to Mr. or Mrs. Pickard. During the latter part of 1934 Mr. Pickard requested Mr. Phelps to go to Lincoln, Nebraska, for the purpose of purchasing for him a radio station located in that city and on or about January 18, 1935, he sent to Mr. Phelps the check dated January 3, 1935, heretofore referred to, for $7,200.00 to be used in connection therewith. This check was de-
40 posited by Mr. Phelps in a special account known as "Richard K. Phelps, Attorney for S. & F. Pickard." Thereafter Mr. Phelps went to Lincoln in response to said request. However, he was unable to purchase the station and so advised Mr. Pickard.

22. On or about March 1, 1935, Mr. Pickard advised Mr. Phelps that he was in need of money and asked him to return the $7,200.00 which he did on the above date. The stock in the applicant recorded in the name of R. K. Phelps, without his knowledge or consent, was so recorded at the direction of Mr. Pickard for the convenience of the Pickards and it has been, at all times since it was so recorded on July 2, 1934, owned by Mr. and/or Mrs. Pickard who have, as shown above, received all of the dividends thereon. This stock, and the dividends thereon were not given to Mr. and/or Mrs. Phelps by Mr. and/or Mrs. Pickard; this fact was admitted by Mrs. Pickard on more than one occasion to Mr. and Mrs. Phelps. This stock and the dividends thereon have never been owned or claimed by Mr. or Mrs. Phelps. When Mr. Phelps learned on information received from the Collector of Internal Revenue that said stock was recorded in his name he protested to the Pickards and demanded that it be transferred to the real owner thereof.

23. On June 28, 1943, a contract was entered into by and between Francke P. Pickard of Miami Beach, Florida, and Mary Belle Redden of Hendersonville, North Carolina, for the sale of 240 shares of the capital stock of WOKO, Inc., held of record by R. K. Phelps for a consideration of $75,000. In this contract Mrs. Pickard represented that the stock certificate (No. 18) for said 240 shares had been endorsed in blank by R. K. Phelps, and that she was on the date of the contract the owner and holder thereof. Said certificate is now held in escrow pending the consent of the Commission to the transfer of said stock.

24. From the very beginning of the transactions between Mr. Smith and Mr. Pickard concerning the stock referred to above, the latter has requested that his stock interest
41 be not disclosed, giving as his reason therefor that it might be embarrassing to him at Columbia and that it was unnecessary to report the stock interest of himself, Mr. Lowman, or other persons or corporations holding the same for him, to the Federal Radio Commission as its rules did not require it, Mr.

Smith testified that he relied on such advice. After the Federal Communications Commission was established, Mr. Smith pointed out to Mr. Pickard that the new application forms required disclosure of all stockholders holding 10% or more of the applicant's stock (as had the Federal Radio Commission forms), and he was again requested by Mr. Pickard not to disclose his stock interest as he did not want such fact made known to the Commission and Columbia. Upon the insistence of Mr. Smith, the 240 shares of stock (Certificate No. 14) then held in his name for Mr. or Mrs. Pickard were transferred and, accordingly, Certificates Nos. 15, 16, and 17 were issued as shown above.

25. On December 10, 1930, the Hudson Valley Broadcasting Company filed an application, signed by Harold E. Smith, with the Federal Radio Commission, requesting authority to assign the license of Station WOKO to WOKO, Inc. Paragraph 6 of said application reads: "State fact showing assignee's financial responsibility with respect to operation of station described in this application." In response thereto it was shown: "Mr. R. M. Curtis and H. E. Smith are principal officers and holders of 75% of stock of new corporation and will be actively connected with station as in the past several years." It will be noted that the applicant failed to disclose in said application the following pertinent facts which should have been made known to the Federal Radio Commission: That WOKO, Inc., was being financed by The Press in that all of the stock in said corporation held of record by Mr. Smith and Mr. Curtis (75%) had been pledged to, and was being held by, The Press as collateral security for its endorsement of the
42 WOKO, Inc., note for $35,000; that such stock would be so held until said note was paid; that The Press held an option to buy the remaining 25% of such stock; and that 240 shares (24%) of the stock held by Mr. Smith and Mr. Curtis was to be assigned to Mr. Pickard or to someone named by him.

26. From February 26, 1932 to February 26, 1934, inclusive, the applicant filed with the Federal Radio Commission five applications for renewal of license, all of which were signed by Mr. Smith as Secretary-Treasurer. In all of said application forms the following information was requested: "Give names and addresses and citizenship of all stockholders owning and/or voting 10% or more of applicant's stock and percentage of stock held by each." In the applications dated February 26, 1932 and July 28, 1932, the response thereto was as follows: "75% of stock owned by Harold E. Smith and Raymond M. Curtis, each owning 37½%. 25% held in treasury unissued. Americans." In the remaining three applications dated January 19, 1933, July 31, 1933, and February 26, 1934, the responses thereto were as follows: "75% of stock owned by Harold E. Smith and Raymond M. Curtis, each owning 37½%.

25% owned by Press Company, Inc." Also, on May 21, 1934, the applicant filed with the Federal Radio Commission an application for a modification of radio-broadcast license, signed by Mr. Smith as Secretary-Treasurer, paragraph 6 of which read as follows: "The applicant's last application for station license is to be considered as a part of this application and the truth of the statements therein contained is hereby reaffirmed except in so far as contrary expressly appears in this application." Nothing to the contrary appeared therein.

In connection with the above responses, disclosure was not made of the following facts: That during all of said period the stock interest of Mr. Smith and Mr. Curtis was 25½% each and not 37½% as represented in said applications and that Mr. Pickard
43 and/or Mrs. Pickard held directly or indirectly 24% interest in the applicant corporation. Furthermore, that during part of said period the Pickard stock was held of record by Mr. Smith; The Press held an option to purchase the 25% treasury stock; and the stock of Mr. Smith, Mr. Curtis and Pickard (amounting to the authorized shares) 75% was hypothecated with The Press as collateral for its endorsement on a note for $35,000 signed by the applicant.

Mr. Smith admitted in this proceeding that representations made to the Federal Radio Commission in various applications between October 23, 1931, and July 1934, and specifically in an application for renewal of license dated July 26, 1932, relative to the stock distribution of the applicant were not true.

27. In an application for renewal of license filed by the applicant with this Commission, dated July 27, 1934, it reported, in response to the request therein for information concerning stockholders holding 10% or more of the applicant's stock: Mr. Smith and Mr. Curtis held 25½% each and The Press 25%. No mention was made of the remaining 24% which had been assigned to R. K. Phelps of July 2, 1934 (Certificate No. 18). On September 21, 1934, the applicant filed an application for modification of license. Paragraph 6 thereof reads as follows: "The applicant's last application for station license is to be considered as a part of this application and the truth of the statements therein contained is hereby reaffirmed except insofar as the contrary expressly appears in this application." Nothing to the contrary appeared therein.

28. From January 29, 1935, to September 28, 1942, the aplicant filed with this Commission a total of 22 applications consisting of 14 renewal applications, 4 applications for construction permits, 2 applications for licenses to cover construction permits, and 2 applications for modification of license, all of which either stated directly or by reference to other applications that the

stockholders of WOKO, Inc., were as follows: H. E. Smith
44 25½%; R. M. Curtis 25½%; The Press Company, Inc. 25%; R. K. Phelps 24%.

29. On November 6, 1933, Mr. Smith testified at a hearing involving an application by WOKO for a modification of its license (Docket No. 1899). In response to a question as to who owned the stock of WOKO, Inc., he answered: "Harold E. Smith, 50%; R. M. Curtis, 25%; and The Press, 25%." On the above date, the records of the applicant corporation disclose that Mr. Smith held of record 495 shares (49½%); Mr. Curtis 255 shares (25½%), and The Press 250 shares (25%). The fact is that Mr. Smith was accommodation holder of 240 shares (24%) of such stock (Certificate 14) for Mr. or Mrs. Pickard. Mr. Smith admitted in the instant proceeding that he had endorsed said certificate in blank on February 2, 1933, the date of issuance; that he had sent it to Mr. Pickard, and that it was held by Pickard at the date of said hearing.

30. It is the contention of Mr. Smith that he had no definite information concerning the identity of the beneficial owner of the 240 shares of stock held of record by R. K. Phelps until he received a letter from Mr. Pickard dated June 15, 1942, in which it was stated: "* * * For personal reasons I transferred my stock to Mrs. Pickard who later requested you to transfer this stock to R. K. Phelps to hold as a matter of convenience to her. * * *"

31. A member of the Law Department visited Station WOKO in December 1942, and requested the permission of Mr. Smith to examine his correspondence with Mr. Pickard relative to the Phelps stock. He asked if there was a file known as "Pickard" file and was advised that such a file had been kept, but it had been broken down, part of the contents placed in other files and part of it destroyed as it was the policy to destroy correspondence after three years. A search of the files disclosed only a copy of a letter from Mr. Smith to Mr. Pickard found in the "Phelps" file.

Thereafter, some such correspondence was found at vari-
45 ous places and Mr. Smith produced part of it which he had found at his farm and his home. Some of the correspondence between Mr. Smith and Mr. Pickard was admitted in evidence in this record. The explanation offered by Mr. Smith at this hearing concerning some of it being found at his home and not in the station's files was: That Mr. Richardson was in charge of the filing; that he (Smith) had received very little correspondence from Mr. Pickard; that he had been confined to his home by illness in 1938 and that such correspondence might have been referred to him there; or that on occasions letters from Mr. Pickard may have been carried home by him as they were of a

Cert.	Shrs.	Date	Issued to	Endorsed	Held by	Re-issue	Red. Hldr.
1	255	12/16/30	Curtis [1]	To Press [2] 1/16/31	Press		
2	70	12/16/30	do [1]	To S. Pickard [3] 1/16/31	do		
3	50	12/16/30	do [1]	To Lowman [4] 1/16/31	do		Smith.
4	255	12/16/30	Smith [5]	In blank	do		
5	70	12/16/30	do [5]	To S. Pickard 1/15/31	do		
6	50	12/16/30	do [5]	To Lowman 1/31/31	do		
7	70	10/23/31	S. Pickard	To F. Pickard 10/28/31	do	For #2	
8	50	10/23/31	Lowman	To F. Pickard 11/4/31	do	For #3	
9	70	10/23/31	S. Pickard	To F. Pickard 10/28/31	do	For #5	
10	50	10/23/31	Lowman	To F. Pickard 11/4/31	do	For #6	
11	250	8/29/32	Press [2]		Curtis	No. #1	Press. Curtis.
12	255	10/29/32	Curtis		F. Pickard	For #7, 8, 9, & 10	
13	240	8/30/32	F. Pickard [7]	To Smith [8] 1/30/33	F. Pickard	For #13	
14	240	2/ 2/33	Smith	In blank 2/2/33			
15	80	6/18/34	F. Pickard	To Phelps 7/2/34	S. Pickard	For #14	
16	80	6/18/34	Esspick Corp. [9]				
17	80	6/18/34	Sampick Corp. [10]	In blank 10/29/34	S. Pickard	For # 15, 16 & 17	Phelps.
18	240	7/ 2/34	Phelps [11]				

[1] Raymond M. Curtis. [2] The Press Company, Inc. [3] Sam Pickard. [4] Lawrence Lowman. [5] Harold E. Smith.
[6] Option exercised. Consideration paid, $25,000 cash.
[7] Francke P. Pickard, wife of Sam Pickard. Stock of Mr. Lowman (C[illegible]ificates 8 and 10) was acquired by Sam Pickard and given to Mrs. Pickard.
[8] This stock held of record by Smith from 2/2/33 until 6/18/34 at the request of Sam Pickard.
[9] Esspick Corporation = Corporations controlled by S. & F. Pickard Certificates.
[10] Sampick Corporation = 15, 16, and 17 issued at directions of S. Pickard.
[11] Richard K. Phelps, brother-in-law of Sam Pickard.

personal nature; and that such letters were inadvertently not returned to the office.

32. In determining the probative value, if any, of the contention of Mr. Smith and his testimony in support thereof that he had no definite information as to the identity of the beneficial owner of the Phelps' stock prior to his being informed in the letter of June 15, 1942, referred to above thereto, the facts shown below should be considered.

33. A number of letters were written by Mr. Smith, Mr. Pickard and other parties concerning the stock held of record by R. K. Phelps, some of which were admitted in evidence in this proceeding, part thereof is here considered. The names of the parties, the date of the letters and excerpts therefrom are shown below:

Smith to Pickard, 9/22/34, enclosing Certificate No. 18 issued to R. K. Phelps.

Biller[1] to Smith, 3/3/38. "I have been instructed by Mr. Sam Pickard to write to you to advise me the total amount of dividends paid to Mrs. Francke Palmer Pickard by your company during the calendar year 1937."

Smith to Pickard, 6/17/38. "At a director's meeting yesterday a dividend of $14.00 per share was declared. Enclosed is a check covering. While it may not pay off the mortgage on the old home, it ought to help a bit!"

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Pickard to Smith, 10/8/38. "My chief worry is that we might lose CBS to a better station in that locality. I wonder if you and Curtis should go in and try to get our contract extended for a couple of years longer. If you want I will feel this situation out also."

Smith to Pickard, 10/12/38. "Of course, anything you can do to assist in connection with WOKO will be merely protecting your own interests as well as the corporation's."

Pickard to Smith, 7/7/39. "* * * As I recall, you have always been consistent with a dividend check about this time of year. * * * How about declaring out what you can spare? About all the small stockholder can do is to let out a little squawk occasionally. * * * You should think twice before spending beyond our capital reserve. * * *"

Smith to Pickard 12/18/39. This letter refers to an inquiry from the Internal Revenue Officer about dividends paid on the Phelps' stock. "It would be somewhat embarrassing to reveal the actual owner of this stock, but we certainly don't want to get involved in any investigation by the Internal Revenue Service."

Pickard to Smith 12/19/39. "* * * Let me know * * * when and how much you are going to be able to do on dividends."

[1] Biller and Snyder, New York accountants for Pickard.

Smith to Pickard 12/29/39. "In regard to your stock now in the name of R. K. Phelps, as long as this matter has been placed before the Collector of Internal Revenue of Kansas City, don't you think it might be just as well to straighten the thing out at this end and transfer the stock to the name of Francke Pickard. * * *"

Biller to Smith, 12/21/39, "At the request of Mr. Sam Pickard, we have replied to the inquiry of the Collector of Internal Revenue of Kansas City, and enclose herewith a copy of our reply."

Biller to Collector of I. R., 12/21/39. "Although Mr. R. K. Phelps is the owner of record of the stock of WOKO,
47 Inc., in question, that stock is held by and owned by Francke Palmer Pickard. * * * The stock in question was recorded in the name of R. K. Phelps for convenience only. He was never the owner of the stock, nor did he ever receive any of the dividends. All dividends were received by Francke Palmer Pickard. * * *"

Smith to Pickard, 1/12/40. "I feel sure you will be glad to get the enclosed. The size of the dividend is not too bad when you considered that we built Radio Center only last year."

Smith to Pickard, 5/7/40, requesting Mr. Pickard's assistance concerning Columbia contract. "You can do a lot in this situation and I urge you to give us your help, in self interest, and for the sake of the station."

Pickard to Smith, 5/17/40. "I have a substantial interest in the business and naturally feel it a constant loss not having the opportunity to see you more often and learn more intimately what is going on. I am glad to see our statements reflecting improvement and hope that we can soon be out of debt as I feel that in these times a large back-log of reserve is essential."

Smith to Pickard, 5/21/40. "You mentioned your substantial interest in the affairs of WOKO. That is quite correct and applies as well to Raymond Curtis, The Press Company, Inc. and myself."

Smith to Pickard, 1/2/41. "At the annual directors meeting a dividend of $27.50 per share was declared, payable January 2, and I am enclosing a check for $6,400. Have you been able to do anything in regard to the transfer of WOKO stock? With the Commission tightening up its regulations and inquiring into every last detail, I feel very strongly that this matter should be taken care of without further delay."

Conclusions

1. From approximately October 23, 1931, until the present time, Sam Pickard and/or Francke Pickard, his wife, or
48 corporations which they controlled, were the real owners of

240 shares of the common stock of the applicant corporation, amounting to 24% of the outstanding capital stock. During this time they received all dividends paid on this stock.

2. The applicant corporation, however, in reporting to the Federal Radio Commission and to this Commission the names of its stockholders and the extent of their holdings, concealed the fact that the Pickards held this stock interest, and represented that these 240 shares were held by others. This misrepresentation and concealment was in violation of Section 10 of the Radio Act of 1927, Section 308 (b) of the Communications Act of 1934, and the Rules and Regulations of both Commissions.

3. In administering its statutory duties under the Communications Act of 1934, this Commission is called upon to scrutinize carefully the applicant's qualifications, as set fort', in Section 308 (b); to determine whether the citizanship requirements of Section 310 have been met; to inquire whether the applicant or parties in interest have been adjudged guilty of violating the anti-trust laws as set forth among other provisions of Section 311 and Section 313. In deciding whether the proposed operations would serve "public interest, convenience or necessity," consideration must be given to the character, background, and training of all parties having an interest in the proposed license. It is, therefore, apparent that the performance of this statutory duty requires full information about each of an applicant corporation's stockholders. The failure in this case to disclose that the Pickards were stockholders in WOKO, Inc., prevented a determination of their qualifications and fitness under the Communications Act.

4. This concealment was not caused by a slight inadvertence nor was it the result of an isolated incident. On the contrary, the testimony clearly establishes that the deception was carried on at Pickard's instigation for approximately 12 years. Pickard was not the only person responsible. He was aided from
49 the inception of the scheme by Harold E. Smith, who has been a principal in WOKO since it was established, and who, during the entire period, has been the General Manager in complete charge of the station's operations as well as an officer and director of the corporation. Together, Smith and Pickard hold 49½% of the stock.

During this 12-year period, WOKO, Inc., filed numerous applicatons and statements with both the Radio Commission and this Commission, all of which failed to disclose the name of the Pickards as stockholders or any reference to their interest in the corporation. Moreover, in corroboration of these misrepresentations, Smith appeared on behalf of the applicant corporation at various hearings affecting WOKO and furnished false testimony to both

Commissions regarding the identity of WOKO stockholders, and the number of shares held by each, so as to conceal the Pickard holdings.

5. The representations made in this proceeding, that the officers of the applicant corporation, particularly Harold E. Smith, its secretary-treasurer-manager, and Raymond M. Curtis, its president, did not have definite information concerning the identity of the beneficial owner of 240 shares, amounting to 24% of the capital stock of the corporation, listed under the name of R. K. Phelps from July 1934 until the date of this proceeding, raise further questions as to the extent to which the Commission may with assurance accept statements of this applicant. The evidence shows that Smith continued to correspond with Pickard as an interested principal in the operation of WOKO during this entire period, that he had no such correspondence with Phelps in whose name the Pickard stock was listed. There is no reasonable doubt but that he had definite information as to the real ownership of the stock listed in the name of Phelps. The president of the applicant corporation, Raymond M. Curtis, who was also a director, has been long associated with Smith and was familiar with the manner in which Pickard obtained his interest in WOKO. The capital structure of the applicant corporation was so arranged and maintained that Curtis and Smith together should always hold a controlling interest. There were only four stockholders all told. Of these, Smith, Curtis and Pickard held 75% of the stock. The record shows that Pickard took a continuing interest in the business of WOKO and it is equally clear that Phelps took no interest at all in the station. Under these circumstances, the Commission would be credulous indeed to accept without question representations that the directing officers of the applicant corporation did not know the identity of the real owner of the stock listed and reported as owned by R. K. Phelps over an eight year period from 1934 to 1942.

6. The applicant cannot deal with the Commission at arm's length, and the "morals of the marketplace" cannot be a standard of candor under the Communications Act of 1934. In the Matter of Van Curler Broadcasting Corp., 9 F. C. C. 92, 101 (1942); In the Matter of the Mayflower Broadcasting Corp., 8 F. C. C. 333, 338 (1940); In the Matter of John H. Stenger, 8 F. C. C. 434, 444 (1940). In the performance of our statutory duties we are called upon to determine whether the operation of proposed stations or the continued operation of stations previously licensed would serve public interest. In so doing, we are forced to rely to a great extent upon the representations made in applications, in statements, and in testimony offered at hearings. It is significant that under the

provisions of the Act, a station license is subject to revocation for false statements in an application. (Section 312 (a)), Communications Act of 1934, as amended.

7. From a consideration of all the material facts found in the record of this hearing, the Commission has concluded that the applicant cannot be entrusted with the responsibilities of a licensee.

The Commission, therefore, finds that a grant of the application for renewal of license for the operation of WOKO by the applicant corporation would not serve public interest, convenience, or necessity and therefore should be denied.

51

FEDERAL COMMUNICATIONS COMMISSION,
T. J. SLOWIE,
Secretary.

Adopted, November 9, 1944.

* * * * *

Before Federal Communications Commission

Exceptions and request for oral argument

Comes now WOKO, Incorporated, applicant in the above-entitled cause, by its attorneys, George O. Sutton, Michael D. Reilly and Samuel A. Jacobs, and files its exceptions to the Proposed Findings of Fact and Conclusions of the Commission in the above proceedings.

I. PRELIMINARY STATEMENT

This proceeding arose upon an application dated September 29, 1942 of WOKO, Incorporated for renewal of license for operation of radio broadcast station WOKO, Albany, New York. On January 12, 1943 the Commission designated the application for hearing, and by notice dated January 26, 1943, specified the following issues to be determined at the hearing:

"1. To determine whether the representations and statements made to the Commission or its predecessors, the Federal Radio Commission, by the licensee, its officers, directors, stockholders, or agents, with respect to the ownership or transfer of, subscription to, or consideration paid for the stock of WOKO, Inc., truly and accurately reflect the facts.

"2. To determine all the circumstances and conditions under which the stock of WOKO, Inc., has been issued, transferred or assigned.

52 "3. To determine whether or not the applicant is qualified to continue the operation of Station WOKO.

"4. To determine whether, in view of the facts adduced under the foregoing issues, public interest, convenience and necessity would be served by a grant of this application."

The hearing was conducted before a duly qualified official of the Commission on July 1, 2, 3, 5, 22, August 3, September 20, 21, 22, 23, 1943.

II. EXCEPTIONS

1. Exception is respectfully taken to all of the Proposed Findings of Fact and Conclusions of the Commission in that the Commission sets forth only the facts supporting its conclusions.

There is much uncontradicted evidence in the record which establishes facts directly contrary to the facts found by the Commission and which when weighed against the facts found by the Commission lead to entirely different conclusions. The Commission evidently did not consider these facts or else it would have reached different conclusions. In various places throughout the Proposed Findings of Fact and Conclusions of the Commission, the Commission sets forth that such-and-such is the contention of the applicant but makes no express finding that the contention did not have a reasonable basis, nor does the Commission state the undisputed facts which tended to support the contention at the particular times in question. The Commission also sets forth many excerpts from documents and correspondence which, when considered alone and without considering the whole document, lead to erroneous conclusions. The Commission also failed to include excerpts from other related documents which, if considered, would have led to different conclusions than those reached by the Commission.

The Commission nowhere finds that WOKO has not been operated in the public interest. Indeed the uncontradicted
53 testimony is that it has been so operated. The Commission's proposed finding is simply that on account of earlier misdeeds of its officers the applicant cannot be trusted to operate in the public interest in the future. The Commission nowhere imputes to the applicant or its officers any mercenary purpose, nor does it find that the suppression of information respecting the beneficial ownership of the stock in question influenced or affected any official act of the Commission, or hampered it in the performance of its duties.

Cognizance is taken of the fact that the rules for appraisal of testimony are properly based on the theory of weighing the testimony and are not predicated on the theory that the testimony must be so overwhelming as to compel a particular conclusion. Nevertheless, the Commission's attention is called to the fact that it should not be unmindful of the type of sanction vested in it with respect to a violation of the nature charged in these proceedings. The sanction is, in effect, a revocation of license which is synonymous with capital punishment, and hence in

weighing the testimony some additional amount of tolerance must be allowed in balancing the scales of conflicting evidence. It would seem that above all the conclusions to be drawn from the evidence must be related to motives for misbehavior.

The Commission will find that in the chronological stream of events related by witnesses, there is a different regulatory impact on the early part of the stream than on the latter part. The Commission must find that there was no such duty of revealing and disclosure at the inception of the relationship of Pickard's stockholdings, as may well have existed at a later date. At the worst, the evidence would indicate that Pickard, rather than the licensee, may have had a motive for desiring an anonymity as to his interest, but it is clear and undisputed in the evidence that the motive was not one for the benefit of WOKO or of the owners thereof. Such an anonymity had no relationship
54 to taxes, profits or any other conceivable regulation of the FCC. The motive for such anonymity derived out of relationship of Pickard to Columbia Broadcasting System. The Commission must find such motive understandable and plausible. It should not be impertient to suggest at this time that the motive for an anonymity was prompted by the absence of proper regulations with respect to intra-licensee ownerships, namely, officers, stockholders or staff members of a network having stock or other relationships to any individual station.

Although much of the evidence would indicate that Phelps, a man of distinction, was blind to any possible desire of an anonymity as to the Pickard relationship to WOKO, there is, nevertheless, evidence to show some confusion as to this aspect of the situation. Reference is made to two most significant acts, one the receipt of a check in the sum of $7,200 deposited to his account, and two the admitted signature of Phelps on the stock certificate.

But the issue of fact before this Commission does not rest solely on the relationship between Pickard and Phelps. In fact, that relationship, to a great extent, is entirely irrelevant since the issue of fact really is whether WOKO had sufficient knowledge to create a technical violation of later regulations, which technical violation might conceivably invoke the sanction of a loss of all rights. Viewed against the total absence of any conceivable motive on Smith's or WOKO's part to be hurtful in any way to the FCC or to gain any personal advantage, there is enough in the record to find that to a layman like Smith the relations between Phelps and Pickard were themselves of such a confused nature that there was no inevitable duty on Smith's part to come to the conclusion that there was any intentional or unintentional actual concealment of the true facts. An objective

reading of the testimony can well lead to the conclusions that there was at the least real confusion as to the status of the ownership, which status must be appraised in relation to profits, dividends, voting powers, depositary of stock certificates, power of transfer, etc.

55 It is suggested that the Commission in appraising the exceptions, bear in mind the motives, the incapacity for enrichment, the absence of additional profit or tax saving and of any conceivable benefit through any action of the Commission vis-a-vis the alleged anonymity, and above all the Commission should bear in mind, consistent with its past policy, that in cases of clear deception, on the issue, such as the procuring of a license, the Commission has properly been loath to destroy a licensee for any violations of regulations on disclosure in cases of more serious import than any that can conceivably be found in the instant case.

SPECIFIC EXCEPTIONS

2. Exception is taken to the findings contained in paragraph 1 of the Commission's Proposed Findings of Fact and Conclusions in that the Commission fails to include the order of Commissioner Paul A. Walker, dated June 30, 1943, which was as follows:

"It appearing that the hearing issues now designated by the Commission are broad enough to permit, within reasonable bounds, the introduction of evidence suggested by the proposed issue of the petitioner and that the requested amendment and enlargement of the hearing issues is therefore unnecessary."

Counsel for WOKO had previously petitioned the Commission (filed June 26, 1943) to amend and enlarge the issues theretofore set forth. A request had been made to insert an issue with respect to the nature, character and extent of the program service rendered by WOKO in the past as well as that which would be rendered in the future. Commissioner Walker ruled that evidence might be adduced along that line without the necessity of inserting another issue. Therefore, when the Commission in its proposed findings of fact failed to include this interpretation

56 of the issues, it more or less foreclosed the consideration of evidence of this character. In fact, nowhere in the Proposed Findings of Fact and Conclusions of the Commission is there any digest of the evidence which was adduced on this subject. (T. 960-992. App. Ex. 58, 61.)

3. Exception is taken to the findings contained in paragraphs 3 and 4 of the Commission's Proposed Findings of Fact and Conclusions in that the Commission sets forth the stockholders and directors of the Adirondack Broadcasting Company, licensee of

Station WABY. The Adirondack Broadcasting Company was not a party to the hearing and the inclusion of this data is entirely unnecessary and irrelevant to the instant proceeding.

4. Exception is taken to the findings contained in paragraph 15 of the Commission's Proposed Findings of Fact and Conclusions in that the Commission finds that the reason for the failure to issue the Pickard stock immediately on the formation of the corporation was due to Smith's desire to await a permanent contract with Columbia, whereas the undisputed fact is that all the issued stock of the corporation was pledged with the Press Company against its guaranty so that none of it could be issued to Pickard, whether or not the permanent Columbia contract was obtained, unless it was first taken out of the pledge. (T. 39, 42, 46, 47, 48, 364, 365, 402, 939, 940.)

5. Exception is taken to the findings contained in paragraph 17 of the Commission's Proposed Findings of Fact and Conclusions. In paragraph 17 the Commission briefly states that on January 30, 1933, Mrs. Pickard endorsed 240 shares of stock, Certificate No. 13, to Mr. Smith to hold for the Pickards. Nowhere in this finding is there any finding with respect to the reasons for such transfer. The uncontradicted evidence of Mr. Smith is that this request was the result of his urging Mr. Pickard to permit the ownership of the stock to be revealed to the Commission. (T. 66, 67, 69, 74, 439, 441, 442, 443, 446, 447.)

57 The Commission further fails to find that when Stock Certificate No. 14 was broken up into three separate parts in June 1934, this was the result of statements by Mr. Smith that he would reveal the true ownership unless Mr. Pickard did so. (T. 76, 77, 129, 130, 484.)

The bare finding that on July 2 1934, Certificates 15, 16, and 17 were surrendered and Certificate 18 for 240 shares was issued in the name of R. K. Phelps, without the Commission finding the other related facts in connection therewith, is erroneous and prejudicial to the applicant.

6. Exception is taken to the findings contained in paragraph 19 of the Commission's Proposed Findings of Fact and Conclusions in that the Commission fails to find that Smith did not know that Pickard was the owner of the stock standing in Phelps' name and that the deliberate forgeries of Phelps' endorsement on the dividend check by Phelps' wife and Pickard's wife, were committed with the deliberate purpose of concealing from Smith and the other officers of WOKO the fact that Phelps was not the beneficial owner of the stock, and that those forgeries accomplished their designed purpose. And further, in that the Commission failed to find that those forgeries conclusively rebut any charge that Smith was a party to the concealment of the true

ownership of the Phelps stock, for if he were the forgeries would have been unnecessary. (T. 77, 78, 79, 89, 90, 91, 93, 104, 105, 106, 136, 137, 138, 139, 140, 146, 147, 153, 157, 158, 160, 164, 167, 168, 169, 170, 212, 213, 214, 215, 216, 244, 245, 281, 282, 284, 288, 312, 316, 320, 322, 323, 324, 325, 328, 329, 330, 332, 335, 339, 340, 455, 487, 488, 564, 565, 566, 567, 568, 578, 590, 591, 597, 703, 704, 708, 715, 723, 724, 725, 726, 727, 732, 741, 742, 748, 772, 779, 780, 782, 804, 806, 818, 819, 820, 836, 837, 858, 859, 860, 861, 866, 870, 871, 872, 873, 874, 878, 880, 881, 882, 884, 885, 886, 887, 890, 900, 901, 903, 905, 906, 915.) (App. Ex. 24–A, 34–47.)

7. Exception is taken to the findings contained in paragraphs 21 and 22 of the Commission's Proposed Findings of Fact and Conclusions in that the Commission fails to find the undisputed fact that neither Smith nor any other officer of WOKO
58 knew until July 1942 that the Phelps' stock certificate had been endorsed in blank by Phelps and delivered to Pickard. (See previous citations here left out for brevity.)

8. Exception is taken to the findings contained in paragraph 24 of the Commission's Proposed Findings of Fact and Conclusions. The Commission finds: "After the Federal Communications Commission was established, Mr. Smith pointed out to Mr. Pickard that the new application forms required disclosure of all stockholders holding 10% or more of the applicant's stock (as had the Federal Radio Commission forms), and he was again requested by Mr. Pickard not to disclose his stock interest as he did not want such fact made known to the Commission and Columbia." The Federal Communications Commission was not established until July 1, 1934, and the Phelps' stock was issued July 2, 1934. The proof is undisputed that since that time Phelps has been consistently reported as the owner of the stock, and it is likewise admitted by both Pickard and Phelps that until 1942 neither of them ever advised Smith or WOKO that Pickard had any interest in the stock. It follows that Pickard could not have requested any concealment of ownership after the establishment of the Federal Communications Commission.

9. Exception is taken to the findings contained in paragraph 30 of the Commission's Proposed Findings of Fact and Conclusions. The evident conclusion drawn by the Commission from the statement quoted from the letter of June 15, 1942, from Mr. Pickard to Mr. Smith (App. Ex. 24) is that Mrs. Pickard told Mr. Smith at the time the stock was transferred from her to Mr. Phelps that it was to be held by him for her convenience. Pickard in this letter attempted to detail the evidence he gave in the WGST hearing. He does not now affirm that that evidence was true. Moreover he was stating a fact which was patently hearsay, on its face. What probative force can be given

59 an unsupported hearsay statement by Pickard, especially when the original author of the supposed statement was his wife?

10. Exception is taken to the findings contained in paragraph 33 of the Commission's Proposed Findings of Fact and Conclusions. The excerpts of letters as set forth in this paragraph is an erroneous method and manner of considering such letters as evidence. The paragraph itself states that only parts of the letters are here considered. If this be true, and the Commission has not considered all of the letters, circumstances and facts as contained in the record, this is an admission of error, as particularly set out in the first sentence of this paragraph. If a document be admissible at all, then all pertinent parts of that document must be considered in arriving at a conclusion to be drawn from that document. The same applies to the oral evidence as set forth in factual testimony in the record. (Exs. 14, 14A to 14F.)

11. Since this exceptor has already filed proposed findings including conclusions to be drawn therefrom, and since this document is a part of the record, such Proposed Findings of Fact and Conclusions are specifically incorporated herein by reference. Such findings are not physically copied herein because they are already on file; however, they are nevertheless made a part hereof the same as if such findings were physically included herein and attached hereto. Exception is therefore taken to the failure of the Commission to find in accordance with such findings and the conclusions drawn therefrom.

12. Exception is also taken to the failure of the Commission to apply any statute of limitations in its consideration of the questions at issue in this proceeding.

13. Exception is taken to each of the seven conclusions reached by the Commission. It has heretofore been pointed out that only portions of the material evidence have been set out and considered by the Commission and therefore the conclusions are based on portions of the pertinent facts rather than on all of the facts

60 as contained in the record. Only by a consideration of all of the pertinent evidence can a proper conclusion be drawn. It is error on the part of any fact-finding body to fail to give proper consideration to all pertinent facts.

14. It is submitted that had the Commission given proper consideration to all the pertinent facts, it would have concluded as follows:

(1) Although some of the early application forms used by the Federal Radio Commission did not require the disclosure of all persons owning 10 percent or more of the stock of a licensee corporation, nevertheless, in all fairness, the licensee of WOKO, Inc., should have disclosed to the Commission the plan of Mr. Pickard

to acquire a 24 percent interest in the licensee corporation at the time the corporation became the licensee of this station in December 1939, and also the financial arrangements with The Press Company.

(2) This failure to disclose to the Federal Radio Commission the anticipated 24 percent interest of Mr. Pickard in the licensee corporation, WOKO, Inc., was the result of a direct request by Mr. Pickard not to do so. Smith and Pickard did not stand on an equal footing. Pickard's former high public office and his position as a vice president of Columbia make that self-apparent. Pickard knew from his own experience on the Commission the importance of a complete disclosure of all stock interests and financial arrangements when applying for licenses or renewals. Smith, the layman, could not be expected to realize the serious consequence of what seemed to him a simple matter of obliging a friend. He cannot in all fairness be held to the same standard as Pickard could and should be held.

(3) After the financial obligations incurred as a result of the removal of the station to Albany were repaid, Mr. Smith made several requests of Mr. Pickard to permit the disclosure of the 24 percent interest held by Mr. Pickard, his wife, or their per-
61 sonal holding companies in WOKO, Inc. These unheeded requests finally resulted in a notification by Mr. Smith to Mr. Pickard that the new forms prescribed by the Commission definitely required the disclosure of Mr. Pickard's interest, and that unless Pickard's stock interest was eliminated by a transfer of the stock, Smith would disclose the interest of Mr. Pickard to the Federal Radio Commission.

(4) The transfer of the 24 percent interest in WOKO, Inc., to R. K. Phelps in July 1934 was represented to Mr. Smith by Mr. Pickard as a bona fide transaction and a gift by Mr. and Mrs. Pickard of their interest to their brother-in-law, and was the direct result of the insistence on the part of Mr. Smith of the necessity of disclosing this interest to the licensing body, unless that interest was eliminated. At the first opportunity thereafter, Mr. Smith, on behalf of the licensee corporation, reported this stock ownership and has continuously done so as being in the name of R. K. Phelps.

(5) Subsequent to July 1934 Mr. Pickard represented to Mr. Smith that he was the representative or manager of this stock for his brother-in-law Mr. Phelps, and intended to look out for the interests of his brother-in-law in the affairs of the station. Consequently, upon the request of Mr. Pickard, business statements, notices of stockholders' meetings, dividends, and other formal notices were sent to Mr. Phelps in care of Mr. Pickard. All dividends of the station at all times were made out to the stockholders of record, including Phelps.

(6) To say the least, by the process of concealment, half truths, the formation of personal holding corporations, and even forgeries, practiced upon Smith by the Pickards, Smith had been deliberately placed in such a state of confusion as to the actual beneficial ownership of the Phelps-Pickard stock that he did not realize the actual situation in regard thereto. Phelps, the only person other than the Pickards, who knew the exact reason for his being a stockholder of record in the station, and of the assignment
62 in blank of his stock, could have relieved this state of confusion, but he did not. For some strange reason he never communicated with either WOKO or any of its officers, although he knew that WOKO was reporting to the Treasury Department the dividend checks made payable to him.

(7) There is no evidence that Mr. or Mrs. Pickard at any time controlled, or attempted to control, the conduct, management or operating policies of the station. The station's conduct with regard to the public has never once been the subject of criticism by the Commission, and its treatment of forward-looking minority movements has been most progressive and enlightened. It has maintained a true public forum and the public would suffer a grievous loss were it discontinued. The situation calls for disciplinary measures rather than a death sentence.

(8) The origin of the offenses charged, whether of omission or commission, date back more than 13 years. They were committed without any motive of material gain or other mercenary motive and have resulted in no financial advantage to the applicant or to any of its officers. Through good fortune, the offenses have not in any way hampered or affected the Commission in the performance of its functions.

(9) A consideration of the entire record justifies the conclusion that the granting of the pending application for renewal of the license of WOKO, Inc., File No. B1-R-258, Docket No. 6486, will serve the public interest, convenience, and necessity.

63 REQUEST FOR ORAL ARGUMENT

Oral argument on behalf of WOKO, Inc. in Docket No. 6486 is hereby respectfully requested.

Respectfully submitted.

WOKO, INC.,
By GEO. O. SUTTON,
MICHAEL D. REILLY,
SAMUEL A. JACOBS,
Its Attorneys.

By GEO. O. SUTTON,
1030 National Press Building, Washington, D. C.

FEBRUARY 15, 1945.

Before Federal Communications Commission

Order

(March 27, 1945)

At a session of the Federal Communications Commission held at its offices in Washington, D. C. on the 27th day of March 1945:

The Commission, having under consideration the proceedings upon the application of WOKO, Incorporated for the renewal of license of Station WOKO, Albany, New York; and

It Appearing, That "Proposed Findings of Fact and Conclusions" of the Commission were issued on November 9, 1944; that Exceptions thereto were filed on behalf of WOKO, Incorporated, and that Oral Argument was held thereon on March 14, 1945; and

The Commission, having considered the entire record, the aforesaid Findings of Fact and Conclusions of the Commission, the Exceptions thereto, the Briefs, and the Oral Argument, and being fully advised in the premises;

It is Ordered, That the Proposed Findings of Fact and
64 Conclusions of the Commission heretofore issued, Be, And The Same Are Hereby Made A Part Hereof By Reference And Adopted As The Final Findings Of Fact And Conclusions Of The Commission; and

It is Further Ordered, That the application for the renewal of license of Station WOKO, Be And The Same Is Hereby Denied effective on April 27, 1945.

FEDERAL COMMUNICATIONS COMMITTEE,
T. J. SLOWIE, *Secretary.*

* * * * *

Before Federal Communications Commission

Petition for "special order of the Commission" for authority to continue operation of Station WOKO

Comes now WOKO, Incorporated, licensee of Radio Station WOKO, Albany, New York, by its attorney, George O. Sutton, and respectfully petitions the Commission to issue a "special order" for the continued operation of Station WOKO by WOKO, Incorporated, beginning at 3:00 A. M., E. S. T., April 27, 1945, and continuing until such time as the Commission may consider and act upon a petition for rehearing in the above cause, which petition will be filed by this petitioner on or before twenty days after April 27, 1945.

In support of this petition it is respectfully shown unto the Commission that:

1. On March 27, 1945, the Commission announced its order in Docket No. 6486, File No. B1–R–253, adopting the proposed findings heretofore made in this matter and ordering "that the application for the renewal of license of Station WOKO be, and the same is hereby denied effective on April 27, 1945." Under the terms of this order and the rules of the Commission this licensee will not have any authority to operate Station WOKO subsequent to 3:00 A. M., E. S. T., April 27, 1945.

2. Section 405 of the Communications Act of 1934 reads as follows:

65 "Sec. 405. After a decision, order, or requirement has been made by the Commission in any proceeding, any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear: Provided, However, That in the case of a decision, order, or requirement made under Title III, the time within which application for rehearing may be made shall be limited to twenty days after the effective date thereof, and such application may be made by any party or any person aggrieved or whose interests are adversely affected thereby. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted, the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such hearing, reversing, changing, or modifying the original determination, shall be subject to the same provisions as an original order."

The language of Section 405 permits WOKO, Incorporated, to have twenty days after the effective date of the Commission's order in this case, to wit: April 27, 1945; to file a petition for rehearing. Such petition will be filed in due course by this petitioner.

66 Section 405 specifically sets out that the additional time permitted for the filing of a petition for rehearing shall not

automatically stay or postpone the effective date thereof *without the special order of the Commission.* Thus, the continued operation of Station WOKO after 3:00 A. M., E. S. T., April 27, 1945, is left to the discretion of the Commission. Nothing in the statute prevents the Commission from issuing a special order for the continued operation of Station WOKO until the statutory time for filing a petition for rehearing, and a consideration thereof by the Commission, has expired. However, unless such a stay or special order for the continued operation of the station after 3:00 A. M., E. S. T., April 27, 1945, is issued, the "death sentence" will be carried into effect before the time has expired for perfecting and exhausting all statutory remedies.

3. The Court of Appeals in the case of Red River Broadcasting Company v. Federal Communications Commission, 98 F. 2nd 282, decided that it was necessary for an appellant to exhaust all administrative remedies before proceeding with an appeal to that court. Therefore, this petitioner cannot avail itself of the statutory rights of appeal provided for by Section 402 of the Communications Act until it has filed, and the Commission has passed upon, a petition for rehearing as provided for in Section 405. The same question was discussed in the Black River case and the same procedure was affirmed in that case.

4. This petitioner submits that it should not be "executed" at 3:00 A. M., E. S. T., April 27, 1945, and the authority to operate subsequently thereafter be denied because of the variance in the language as contained in Sections 402 and 405 and the decisions of the Court of Appeals with regard to procedure. No good will be accomplished by such procedure. Considerable harm and damage will be caused to this petitioner if it is forced to cease operation at 3:00 A. M., E. S. T., on April 27, 1945 and before the statutory remedies have been exhausted. It is sub-
67 mitted that nowhere in the decision of the Commission has the Commission decided that the program material broadcast by the station was not in the public interest, and to deprive the listening audience in Albany, New York and environs of the service of WOKO will serve no useful purpose.

5. A "special order of the Commission" for the continued operation of WOKO subsequent to 3:00 A. M., E. S. T., April 27, 1945 will not extend the time within which this petitioner may file a petition for rehearing in this cause. In fact, this petitioner hereby stipulates that such petition for rehearing must be filed within twenty days after 3:00 A. M., E. S. T., April 27, 1945.

6. Since March 27, 1945 this petitioner and its counsel have diligently endeavored to find means and ways of reconstructing the present licensee corporation or constructing a new corporation

which would come within the terms of the Commission's decision. There has been no dilly-dallying with the matter and no dilatory tactics have been resorted to and will not be resorted to by this petitioner. However, on account of the seriousness of the decision, every move which this petitioner has made in attempting to reconstruct the corporation has consumed time. Hence, it has not been possible to submit a petition for rehearing to the Commission "of all the facts, including those arising since the former hearing," as contemplated by Section 405 of the Act. Petitioner does, however, expect to reconstruct and reorganize the licensee corporation and/or a new corporation and include in its petition for rehearing a statement of facts which have "arisen since the former hearing" and which it believes will meet the requirements of the Commission. Procedural steps in the reorganization and reconstruction of the present corporation, however, are governed by time limits which are not wholly within the control of this licensee corporation and hence it is necessary to rush negotiations and proceedings even more than would normally occur in order that the petition for rehearing may contain definite, bona fide pro-
68 posals and accomplishments. Counsel believes that it is possible to complete these even before twenty days subsequent to April 27, 1945, and will diligently attempt to file such petition at the earliest possible moment.

7. There are no parties to this proceeding other than the Commission and the applicant, and hence no prejudice can occur as a result of the granting of the order herein requested. On the other hand, considerable prejudice can result to this petitioner and a severe and useless hardship worked upon the listening public of Albany, New York unless this order is granted. The Press Company was permitted to participate in the oral argument and a copy hereof is being served on its counsel.

8. Petitioner respectfully suggests that the principal purpose of this petition is to permit the continued operation of Station WOKO by WOKO, Incorporated, under the same terms of operation as heretofore authorized and until such time as a petition for rehearing may be filed, considered and acted upon by the Commission. In making this suggestion, petitioner requests that the Commission consider the substance, rather than the form, of not only this petition, but of the authority herein requested.

Wherefore, it is respectfully prayed that the Commission issue a "special order" authorizing Station WOKO to be operated by WOKO, Incorporated, beginning at 3:00 A. M., E. S. T., April 27, 1945, under the same terms and conditions of operation as heretofore authorized, and for a period which will permit the filing of a petition for rehearing in this cause within twenty days after

3:00 A. M., E. S. T., April 27, 1945, and the subsequent consideration and decision thereon by the Commission.

Respectfully submitted.

WOKO, INCORPORATED,
By GEO. O. SUTTON,
1030 National Press Bldg., Washington, D. C.

APRIL 20, 1945.

* * * * *

69 Before Federal Communications Commission

Opinion and Order

This matter arises upon consideration of a petition filed by WOKO, Incorporated, licensee of Station WOKO, Albany, New York, for a special order of the Commission granting authority to continue operation of that station after April 27, 1945.

On March 27, 1945, the Commission announced the adoption of its proposed findings of fact and conclusions as its final findings and conclusions in the above-entitled proceedings and issued an order denying the application for renewal of license of Station WOKO to become effective April 27, 1945. The application, which was filed on October 1, 1942, has been the subject of extensive and protracted hearings before the Commission. Approximately 2½ years have elapsed since the expiration of the last regular license issued for the operation of that station.

Under the provisions of section 405 of the Communications Act, a petition for rehearing may be filed by any party or person aggrieved or whose interests are adversely affected by a Commission order within 20 days after the effective date thereof. It was with this provision in mind that the Commission in its order of March 27 provided that continued operation of the applicant's station would be permitted for an additional period of 30 days. This, in the Commission's opinion, afforded applicant ample time within which to prepare and file a petition for rehearing if it so desired. Applicant now seeks a further delay in the effective date of the Commission's order so as to permit the continued operation of its station until such time as the Commission may have had an opportunity to consider and act upon a petition for rehearing which applicant states it proposes to file within 20 days from April 27.

Twenty-eight days have already elapsed since the publication of the Commission's order, yet applicant has seen fit to defer the filing of its contemplated petition for rehearing. Nevertheless, the Commission has determined to grant applicant a special

70 temporary authorization permitting continued operation of Station WOKO until May 2, 1945. If applicant's proposed petition for rehearing shall be filed before that date, the Commission will then of its own motion grant such further authority for the continued operation of Station WOKO as may be necessary to permit full consideration and determination of such petition.

Accordingly, It is Ordered, This 24th day of April 1945, that a special temporary authorization for the continued operation of Station WOKO until 3 a. m. on May 2, 1945, be issued.

FEDERAL COMMUNICATIONS COMMISSION,
T. J. SLOWIE,
Secretary.

Before Federal Communications Commission

Petition for rehearing

Comes now WOKO, Incorporated, Albany, New York, licensee of Radio Station WOKO and applicant for renewal of license in Docket No. 6486, File No. B1–R–253; and files this petition for rehearing in accordance with the Commission's Rules of Practice and Procedure and Section 405 of the Communications Act of 1934.

PRELIMINARY STATEMENT

After hearing and argument the Commission on March 27, 1945, announced the adoption of its proposed findings of fact and conclusions as its final findings and conclusions in the above-entitled proceeding and issued an order denying the application for renewal of license of Station WOKO effective April 27, 1945. On April 20, 1945, this applicant filed with the Commission a petition for special order requesting authority to continue operation of Station WOKO after April 27, 1945. On April 24, 1945,

71 the Commission issued an opinion and order authorizing a special temporary authorization for the continued operation of Station WOKO until 3:00 A. M. on May 2, 1945.

Section 405 of the Communications Act of 1934 and Rule 1.271 of the Commission's Rules of Practice and Procedure provide for the filing of a petition for rehearing within twenty days after the effective date of any decision, order or requirement made by the Commission. Accordingly, the applicant is entitled to file a petition for rehearing in this case at any time within twenty days after April 27, 1945. However, by the decision of March 27, 1945, Station WOKO would have no authority to continue operation after 3:00 A.M. April 27, 1945.

In the Commission's opinion and order of April 24, 1945, the Commission said, among other things, "Nevertheless, the Commission has determined to grant applicant a special temporary authorization permitting continued operation of Station WOKO until May 2, 1945. If applicant's proposed petition for rehearing shall be filed before that date, the Commission *will then of its own motion grant such further authority for the continued operation of Station WOKO as may be necessary to permit full consideration and determination of such petition.*" [Italics supplied.]

INTEREST OF "WOKO," INCORPORATED

WOKO, Incorporated is an interested party and is aggrieved and its interests are adversely affected as contemplated by Section 405 of the Communications Act of 1934, as a result of the Commission on March 27, 1945, issuing an order denying the application for renewal of license in Docket No. 6486, File No. B1–R–253. It has been the licensee of the station for many years. WOKO, Incorporated has invested several hundred thousand dollars in the operation of such station over a period of the past fifteen years or more. Its financial losses will involve several hundred thousand dollars in the event its application for renewal of license in the above-styled docket is finally denied. It is
72 quite apparent that WOKO, Incorporated is an interested party which is aggrieved and adversely affected by the Commission's decision in Docket No. 6486, File No. B1–R–253.

GROUNDS FOR REHEARING

The Commission in its decision of March 27, 1945, denying the application for renewal of license of WOKO, Incorporated, based its decision principally upon certain official acts of certain officers of that corporation. The Commission did not find that the corporation was legally, financially or technically unqualified to hold a license. Nowhere in the decision were the programs or public service heretofore rendered by Station WOKO questioned in any wise. The Commission, however, did find that the present officers and directors and controlling stockholders holding such offices had been guilty of such concealments in official reports to the Commission as to render the corporation unfit to be licensed in the future.

The decision of the Commission did not in any wise pass upon the question of the qualifications of the present stockholders to hold minority interests in a licensee corporation. It simply decided that as now constituted WOKO, Incorporated, was not entitled to a renewal of license and hence, it was denied.

The decision of the Commission does not in any wise terminate the existence of the corporation, WOKO, Incorporated. It is now

and will continue to be, without any authority from the Commission, a legal entity under the laws of the State of New York. Its officers and directors and stockholders may be changed and even the death of any or all would not terminate the existence of the corporation. It is respectfully submitted that the corporation may be reorganized and thus be qualified and entitled to a renewal of license within the spirit of the Commission's decision of March
27, 1945. A corporation does not need the consent of the
73 Commission to change its officers and/or directors, and new ones may likewise be elected without the consent of the Commission. Changes in the stock ownership of a corporation may be made without the consent of the Commission if control is not involved. It is only when the corporation becomes a licensee or applicant for license that the corporation comes under the jurisdiction of the Commission to determine whether or not it is qualified to hold such a license.

With these things therefore in mind, WOKO, Incorporated proposes to reorganize and thus become qualified to hold a license and entitled to a renewal of the license heretofore granted to the corporation. Such reconstruction and reorganization, as proposed, is more fully set forth herein.

PROPOSED REORGANIZATION

The stock of WOKO, Incorporated is distributed as follows:

	Percent	*Shares*
Harold E. Smith	25.5	255
Raymond M. Curtis	25.5	255
The Press Company	25	250
R. K. Phelps	24	240

The latter block of stock is purportedly owned by either Sam Pickard or his wife, Francke P. Pickard. It however still stands on the books of the corporation in the name of R. K. Phelps and neither WOKO, Incorporated, nor its officers can, under the laws of the State of New York, change the record ownership without the surrender of the Phelps' certificate however much it may desire to do so.

The present directors of the corporation are as follows:

Harold E. Smith.
Raymond M. Curtis.
Deuel Richardson.

The present officers of the corporation are as follows:

Raymond M. Curtis, President.
Harold E. Smith, Secretary-Treasurer.
Deuel Richardson, Vice President.

74 The first step in the proposed reorganization is that the corporation, WOKO, Incorporated, will purchase the 240 shares of stock standing in the name of R. K. Phelps. The lowest price the corporation has been able to obtain on such stock is $82,000 cash. WOKO, Incorporated will purchase the stock owned by The Press Company for a consideration of $75,000, which price has been tentatively agreed upon by both parties. The corporation will purchase ten shares each from Harold E. Smith and Raymond M. Curtis. After such purchase, from Smith and Curtis each will own 24.5% of the stock of WOKO, Incorporated. Such purchase will be made at the book value of the stock, which book value will not include goodwill or any intangible values.

It is proposed that the 51% of the stock of WOKO, Incorporated, which will then be owned by WOKO, Incorporated, after same has been purchased from Messrs. Phelps-Pickard, The Press Company, Harold E. Smith and Raymond M. Curtis, will be sold to one or more prominent citizens of Albany who are now negotiating to purchase same.

It is proposed that in the reorganization the 490 shares of stock of WOKO, Incorporated which will then be owned by Harold E. Smith and Raymond M. Curtis, be placed in trust under a voting trust agreement for a period of years; certainly for the normal license period or longer. The said voting trustee shall have full power to vote such stock in any way that he shall deem fit. He shall have power to collect dividends on such stock and distribute it as trustee to Harold E. Smith and Raymond M. Curtis. The voting trust agreement and the voting trustee shall be subject to the approval of the Commission.

It is proposed that all of the officers and directors of the corporation will resign in accordance with the plan of reorganization and that the new stockholders shall elect new officers and directors. None of the existing officers or directors will be elected or serve as officers or directors after the reorganization.

75 WOKO, Incorporated, is now financially qualified and has the cash available with which to buy the stock of The Press Company, the Phelps-Pickard stock and the 20 shares from Smith and Curtis.

NECESSITY FOR REHEARING

The language of Section 405 of the Communications Act of 1934 contemplates a rehearing such as herein requested, to wit: "And if, in its judgment, after such rehearing and the consideration of all facts, *including those arising since the former hearing*". [Italics supplied.] Any proceeding other than a formal hearing would be an ex parte proceeding.

Although certain facts might be adduced by affidavit, the statute contemplates that facts arising since the former hearing shall be placed before the Commission for its consideration in a formal hearing in evidentiary form.

It is furthermore necessary to have a formal hearing in order that the proposed purchasers, officers, and directors may appear before the Commission and submit themselves to examination and cross-examination in order that the Commission may be fully informed as to their qualifications and the policies they intend to pursue in the future operation of the corporation.

TESTIMONY TO BE ADDUCED AT THE REHEARING

WOKO, Incorporated, if permitted to do so at a rehearing, will produce witnesses who will testify that:

1. The corporation shall acquire and own 51% of the capital stock of WOKO, Incorporated and shall be ready and willing to reissue said stock to prospective stockholders. Such acquisition of 51% of its capital stock by the corporation shall result from the purchase of stock now in the name of The Press Company, R. K. Phelps, and ten shares each from Harold E. Smith and Raymond M. Curtis.

76 2. That the prospective stockholders are fully qualified, ready and willing to purchase a total of 51% of the authorized and outstanding capital stock of WOKO, Incorporated, subject to the approval and consent of the Commission.

3. The remaining 49% of the capital stock of WOKO, Incorporated, will be owned in equal shares by Raymond M. Curtis and Harold E. Smith. Such stock will be placed in a voting trust, the voting trustee having full power to vote such stock as he may deem best; such trustee will be a man of unquestioned integrity, ability, and fully qualified to discharge his duties; the voting trust to have a dufation of one normal license period.

4. The present officers and directors of WOKO, Incorporated, will resign and be replaced by others fully qualified to hold such offices and Harold E. Smith, Raymond M. Curtis, and Deuel Richardson will not hold either an office or be named as a director, and will in no wise control or attempt to control the policies of the corporation.

5. If approved, the continued operation of Station WOKO as reorganized and relicensed will serve the public interest, convenience, and necessity.

It is respectfully suggested to the Commission, so that it may be fully informed, that the purchase by WOKO, Incorporated, of the stock now held and owned by The Press Company will also include a sale to The Press Company by Harold E. Smith and Ray-

mond M. Curtis of their present interest in Station WABY also located in Albany, New York. Full details with regard to this proposal are in the possession of the Commission in the form of a proposed contract which was submitted to it several months ago.

Wherefore, It is respectfully prayed that the Commission will, pursuant to Section 405 of the Communications Act of 1934 and its rules and regulations,

77 (1) Grant a rehearing in the above-entitled matter in order that this petitioner may present evidence supporting its plan of reorganization and all other pertinent matters;

(2) Pursuant to its order of April 24, 1945, "grant such further authority for the continued operation of Station WOKO as may be necessary to permit full consideration and determination of such petition";

(3) Grant such further operation as may be necessary and required pending determination as a result of the rehearing herein requested; and

(4) Grant such other and further relief in the premises as the Commission shall deem just and proper.

Respectfully submitted.

WOKO, INCORPORATED,
By HAROLD E. SMITH,
Secretary-Treasurer.

GEO. O. SUTTON, *Counsel,*
1030 National Press Building, Washington, D. C.
MICHAEL D. REILLY, *Counsel.*
SAMUEL A. JACOBS, *Counsel.*
APRIL 28, 1945.

* * * * *

Before Federal Communications Commission

Order

May 1, 1945

Whereas, the Commission in an opinion and order in the above-captioned proceedings, dated April 24, 1945, granted a special temporary authorization for the continued operation of Station WOKO, Albany, New York, until 3:00 a. m.

78 on May 2, 1945, and stated that if a petition for rehearing which applicant represented it proposed to file in the instant proceedings should be filed before that date, it would grant such further authority for the continued operation of Station WOKO as might be necessary to permit full consideration and determination of such petition; and

Whereas, on April 28, 1945, applicant did in fact file such petition for rehearing;

Now, therefore, it is ordered, This 1st day of May 1945, that a special temporary authorization be issued for the continued operation of Station WOKO until further order of the Commission.

[SEAL] FEDERAL COMMUNICATIONS COMMISSION,
T. J. SLOWIE, *Secretary.*

* * * * *

Before Federal Communications Commission

Order on petition for rehearing

At a session of the Federal Communications Commission held at its offices in Washington, D. C., on the first day of May 1945,

The Commission having under consideration a petition filed April 28, 1945, by WOKO, Inc. (WOKO), Albany, New York, for rehearing directed against the Commission's order of March 27, 1945, adopting as final its proposed findings and conclusions announced November 9, 1944, looking toward a denial of the application of WOKO for renewal of license, and denying that application, effective April 27, 1945.

It is ordered, That the petition for rehearing be, and it is hereby denied.

79 It is further ordered, That the special temporary authorization for the continued operation of Station WOKO be, and it is hereby, extended until 3 a. m., Thursday, May 31, 1945.

[SEAL] FEDERAL COMMUNICATIONS COMMISSION,
T. J. SLOWIE, *Secretary.*

Commissioner Wakefield absent; Commissioner Denny not participating.

* * * * *

96 Supreme Court of the United States

Order allowing certiorari

Filed April 22, 1946

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

Thursday, October 18th, A. D. 1945

* * * * *

Before Honorable D. Lawrence Groner, Chief Justice, and Honorable Wilbur K. Miller and E. Barrett Prettyman, Associate Justices.

* * * * *

No. 9021, October Term, 1945

WOKO, Incorporated, appellant

vs.

Federal Communications Commission, appellee

Argument commenced by Mr. William J. Dempsey, attorney for appellant, continued by Mr. Harry M. Plotkin, attorney for appellee, and concluded by Mr. William J. Dempsey.

* * * * *

United States Court of Appeals, District of Columbia

No. 9021

WOKO, Incorporated, appellant

v.

Federal Communications Commission, appellee

Appealed from the Federal Communications Commission

Argued October 18, 1945—Decided January 21, 1946

(United States Court of Appeals for the District of Columbia. Filed Jan. 21, 1946. Joseph W. Stewart, Clerk.)

Mr. William J. Dempsey, with whom Mr. William C. Koplovitz was on the brief, for appellant.

Mr. Harry M. Plotkin, Assistant General Counsel, with whom Messrs. Rosel H. Hyde, General Counsel, Benedict P. Cottone, Assistant General Counsel, and Philip Bergson, Counsel, all of the Federal Communications Commission, were on the brief, for appellee.

Before Groner, C. J., and Wilbur K. Miller and Prettyman, JJ.

Wilbur W. Miller, J.: On September 28, 1942, the appellant, WOKO, Inc., applied to the Federal Communications Commission

for a renewal of the radio station license held by it for the operation of its broadcasting facilities at Albany, New York. Under permits periodically procured this radio station has been operated in Albany for some fifteen years last past. After extended hearings concerning the application of September 28, 1942, the Commission declined to renew the license. This appeal followed under that section of the Communications Act (U. S. C., Title 47, § 402 (b)) which grants to an applicant for renewal of a broadcasting station license the right to appeal to this court from an adverse decision.

Prior to November 1930, Station WOKO was located, first at Peekskill, and later at Poughkeepsie, New York. The license was held by the Hudson Valley Broadcasting Company, a partnership composed of Harold E. Smith and Raymond M. Curtis. Under authority granted by the Commission, the station was moved to Albany on November 25, 1930, and, shortly thereafter, the license was assigned by Smith and Curtis to the appellant. Early in 1931 broadcasting was begun at Albany.

While the station was at Poughkeepsie its operation was not profitable, and Curtis suggested that the license be surrendered. Smith thought it possible that a network affiliation might solve the financial difficulty. Accordingly, he visited the Columbia Broadcasting System at New York, where he met Sam Pickard, a vice president in charge of station relations. Pickard advised that CBS would not be interested in the station at Poughkeepsie, but suggested that if it were removed to Albany CBS would be interested in having WOKO as an affiliate.

Smith went to Albany and conferred with The Press Company, the publisher of the Albany Evening News and the Knickerbocker Press, with the purpose of interesting that company in the enterprise and obtaining financial assistance from it, as Curtis had tried of his losses at Poughkeepsie and was unwilling to finance the station further. The newspaper people agreed to aid, and it was determined that a corporation should be organized with one thousand shares of capital stock, seven hundred and fifty shares to be divided equally between Smith and Curtis and the remaining two hundred fifty shares to be held in the treasury under the option of The Press Company to purchase it. The corporation was organized on December 9, 1930, The Press Company endorsed for it a note to the extent of $35,000, the shares of the capital stock were issued as planned, and the station began to operate at Albany early in 1931. Pickard performed his promise to aid in obtaining a CBS affiliation agreement, and assisted also in other ways. At one of his conferences with Smith, Pickard suggested that he be given an interest in the appellant corporation. It was finally agreed that he have twenty-four percent of the capital stock and, pursuant to this

agreement, on October 23, 1931, Smith and Curtis transferred of record to Pickard a total of one hundred forty shares, and, at his suggestion, to Lawrence Lowman, another vice president of CBS, a total of one hundred shares. These certificates were endorsed by Pickard and Lowman and then delivered to The Press Company to serve as a part of the collateral securing its endorsement. In August 1932, the appellant's loan had been paid and the two hundred forty shares of stock in the names of Pickard and Lowman were released from the pledge and transferred of record to Pickard's wife. On February 2, 1933, the certificates evidencing the same two hundred forty shares, having been endorsed by Mrs. Pickard, were reissued to Smith, endorsed by him in bland and forwarded to Pickard. Smith continued as the owner of record of that block of two hundred forty shares until June 1934, when, at the request of Pickard, he assigned eighty shares each to Mrs. Pickard and two holding companies controlled by the Pickards.

Same Pickard had been a member of the Federal Radio Commission before he became a vice president of Columbia Broadcasting System. When he first asked for and obtained an interest in WOKO, Inc., he requested of Smith that his ownership in the station be kept secret, on the ground that he would be personally embarrassed if his associates at CBS should learn of it. He also informed Smith that there would be no need to disclose his ownership to the Federal Radio Commission, as that Commission was interested only in knowing whether or not any of the stockholders were aliens.

Smith agreed to protect Pickard in that respect and did not disclose to the Radio Commission the fact that Pickard was a stockholder. In 1934, however, when more searching inquiries were made concerning stock ownership by the forms required to be filed with the Communications Commission, Smith notified Pickard that he must divest himself of the stock and that, failing that, he (Smith) would divulge the facts to the Commission. As a result of this ultimatum, Pickard informed Smith that he had decided to give the two hundred forty shares to his wife's brother-in-law, R. K. Phelps, an assistant United States attorney at Kansas City. Mrs. Pickard and the two holding companies, the record owners of eighty shares each of the block of two hundred forty shares in question, endorsed and surrendered the certificates and a new certificate for two hundred forty shares was issued on July 2, 1934, in the name of R. K. Phelps. The stock has remained in his name on the corporate records since that time and has been so represented to the Commission.

When the Commission received on October 1, 1942, the appellant's application for a renewal of its license, dated September 28,

1942, it designated the matter for hearing and specified the following issues:

"(1) To determine whether the representations and statements made to the Commission or its predecessor, the Federal Radio Commission, by the licensee, its officers, directors, stockholders, or agents, with respect to the ownership or transfer of, subscription to, or consideration paid for the stock of WOKO, Inc., truly and accurately reflect the facts.

"(2) To determine all the circumstances and conditions under which the stock of WOKO, Inc., has been issued, transferred, or assigned.

"(3) To determine whether or not the applicant is qualified to continue the operation of Station WOKO.

"(4) To determine whether, in view of the facts adduced under the foregoing issues, public interest, convenience, and necessity would be served by a grant of this application."

There followed then a period of rather intensive investigation by the Commission, which included visits to Albany and Kansas City by a member of the Commission's legal staff. On June 26, 1943, the appellant petitioned the Commission to amend and enlarge the issues by including the following:

"1. To determine the nature, character and extent of the program service rendered by Station WOKO in the past, as well as that which is proposed to be rendered in the future.

"2. To determine the nature, character, and extent of the activities and/or policies of the licensee, its officers, directors, stockholders, agents, and/or employees, with respect to the operation of the station, the public service rendered thereby, and the response of the public to such activities and/or service in the past, and the proposals for future policies, activities and operation."

The Commission declined to amend and enlarge the hearing issues on the ground that those originally designated were "broad enough to permit, within reasonable bounds, the introduction of the evidence suggested by the proposed issues of the petitioner."

Hearings were held in July, August, and September, 1943, at which evidence of many witnesses was received and numerous exhibits were filed as parts of the record. It developed that Smith and Curtis each held twenty-five and one-half percent of the capital stock of the appellant, that The Press Company had exercised its option in 1932 to purchase twenty-five percent of the stock for $25,000, and that the remaining twenty-four percent had stood in the name of R. K. Phelps on the corporation register since July 2, 1934. Phelps testified that he knew nothing of the transfer of the stock to him, that he was not and had never been the actual owner of it and that he had been imposed upon by Pickard in that respect. It appeared that dividend checks regu-

larly had been issued by the corporation to Phelps and had been addressed to him in care of Pickard, and that Mrs. Pickard had endorsed Phelps' name to the checks, then had placed thereon her own endorsement and had accounted for the dividends in her personal income tax returns. Certain waivers of notice of meetings, with Phelps' name signed to them, were sent to the appellant, but it appears that they were signed by Mrs. Pickard. Mrs. Phelps, sister to Mrs. Pickard, testified that she intercepted pieces of mail from WOKO, Inc., addressed to her husband and did not bring them to his attention.

It appears clearly from the evidence that the Pickards received the dividends on the two hundred forty shares of stock, and the Commission's conclusion that they were the beneficial owners of it throughout the entire period in question is well grounded in the evidence. Smith testified that he believed Phelps to be the owner until he was advised otherwise by Pickard's letter of June 15, 1942. Pickard said that he did not inform Smith of the actual fact with respect to beneficial ownership until he wrote that letter. Nevertheless there is enough in the record to justify the conclusion of the Commission that Smith knew, or should have known, that Phelps was not actually the owner of the stock. So, it may be treated as established by the evidence that Smith, in making reports and applications for the appellant from 1934 to 1942, gave the Commission only the name of the record owner of two hundred forty shares of stock, and withheld the name of the beneficial owner, which he knew, or should have known.

The Commission did not find that this concealment of fact had influenced it in making any decision throughout the years involved, nor did it find that it would have acted in any manner differently from the way it did act on the various applications for renewal of license, had it known that the Pickards were the beneficial owners of these shares of stock. The Commission did not find that the Pickards were aliens or that they were disqualified in any way to own the number of shares of the appellant's stock which they beneficially owned. Indeed, such findings could not have been made by the Commission because there is no evidence upon which it could have based them.

There is no finding that Curtis, who owned twenty-five and one-half percent of the appellant's capital stock, and The Press Company, which owned twenty-five percent of the appellant's capital stock, had any part in, or knowledge of, Smith's concealment of the Pickard interest. It does appear that Curtis and The Press Company knew of the original issue of two hundred forty shares to Pickard or his nominee, but there is no suggestion that either participated in or knew of Smith's deception.

Having found that the appellant had failed to reveal to it and to its predecessor, the Federal Radio Commission, the fact of the Pickards' beneficial ownership of two hundred forty shares of stock, the Commission proceeded to the conclusion that the appellant "cannot be entrusted with the responsibilities of a licensee." The findings close thus:

"The Commission, therefore, finds that a grant of the application for renewal of the license for the operation of WOKO by the appellant corporation would not serve public interest, convenience, or necessity, and therefore should be denied."

The question posed by this appeal is whether it clearly appears that this finding of the Commission is arbitrary or capricious, for the statute provides (U. S. C., Title 47, § 402):

"That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious."

This limitation of judicial review of decisions of the appellee is consistent with the general body of law concerning the finality of administrative proceedings. The Congress of the United States, which has plenary power to regulate the radio industry, has designated the Commission as its administrative agent, because it desired to have the regulatory work done by technically trained experts, skilled and experienced in the technical duties of radio regulation. The Congress defined the scope of the authority of its agent or, as is sometimes said, it established the standard according to which the agent should act. The broad scope of authority, or standard of action, established by the Communications Act is that public interest, convenience, and necessity must be served. Within that framework the administrative agent is free to exercise its expert judgment; it cannot act unconstitutionally, for neither could its principal, the Congress, and the stream cannot rise higher than the source; it must proceed within the scope of the authority granted to it, that is to say, it must observe the standard established; and it cannot act arbitrarily or capriciously.

The broad sweep of the power given to the administrative agent to proceed according to a standard which necessarily is expressed in very general and widely inclusive terms proves how pertinent was the observation of Mr. Justice Justin Miller when he said, speaking for this court, that radio station licensees must be protected from arbitrary action of the Commission in the exercise of its regulatory power.[1]

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[1] After showing that the Act does not recognize that licensees have any common law rights in Network radio broadcasting, this court in Yankees v. Federal Communications Commission, 71 App. D. C. 11, said that nevertheless the Act does recognize cer-

Broad as the standard is, the Supreme Court has said that it is not so indefinite as to confer unlimited power.[2] The doctrine is that the act of the administration agent is the act of Congress itself, as long as the agent stays within the boundaries of the standard and does not act arbitrarily or capriciously. Judicial review is limited, therefore, to the ascertainment of whether there has been an unconstitutional thing done by the agent, or whether the agent has exceeded its delegated authority by crossing the boundary of the standard, or has acted arbitrarily or capriciously.

Subject to the specific statutory provisions against the ownership or holding of radio station licenses by aliens, foreign governments, or corporations which have an alien tinge through stock ownership,[3] the Communications Act simply directs the Commission to grant or renew a license if it shall find that public interest, convenience, or necessity will be served thereby.[4] It would be difficult, if not impossible, to formulate a precise and comprehensive definition of the term "public interest, convenience, or necessity," and it has been said often and properly by the courts that the facts of each case must be examined and must govern its determination.[5] It seems clear, however, that a decision of the Commission refusing to renew a license should not be allowed to stand if it appears that the Commission's prior and necessarily basic determination that public interest, convenience, or necessity will not be served by the renewal, was not properly reached; that is, that proper standards were not applied in reaching the conclusion that a renewal would not serve the public interest, con-

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tain rights of licensees and their ownership of their stations. The statute prohibits the use or operation of a broadcasting station except pursuant to a license and punishes as a criminal act the operation of such a station without a license. The opinion continues thus:

"It is apparent, therefore, that a radio broadcasting station is valueless without a license to operate it. It is equally apparent that the granting of a license by the Commission creates a highly valuable property right, which, while limited in character, nevertheless provides the basis upon which large investments of capital are made and large commercial enterprises are conducted. As it is the purpose of the Act to secure the use of the channels of radio communication by private licensees under a competitive system, these licensees must be protected in that use, not merely from unlicensed stations and unlicensed operators, but from improper activities of licensed stations and operators, and from arbitrary action by the Commission, itself, in the exercise of its regulatory power."

[2] Federal Radio Commission v. Nelson Bros. Company, 289 U. S. 266, 285.

[3] The Communications Act (U. S. C., Title 47, § 310) contains a provision that a radio station license shall not be granted to or held by an alien, nor by a corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens, as well as other restrictive provisions designed to keep the broadcasting service of the nation under domestic control.

[4] U. S. C., Title 47 § 307 (a): "The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter."

U. S. C., Title 47, § 309 (a): "If upon examination of any application for a station license or for the renewal or modification of a station license, the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission, upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe."

[5] Section 402 (c) of Communications Act; Federal Communications Comm. v. Pottsville Broadcasting Co., 309 U. S. 134.

venience, or necessity, and thus that the conclusion reached was arbitrary or the result of caprice.

It is obvious that, in dealing with an application for the renewal of a license, the quality of the applicant's programs and the adequacy of the applicant's mechanical and scientific broadcasting facilities are principal among the elements to be considered. Concerning these particulars although the Commission made no finding with respect to them, substantial and undisputed evidence in the record shows that Station WOKO consistently has rendered reasonably satisfactory service to its listeners and that it has not been guilty of delinquency in service which would support the conclusion that it should be denied a renewal of its license for that reason. Probably the principal concern which the general public has in Station WOKO is with the quality of the music and messages which it emits.

It should be remembered that the appellant sought the enlargement of the issues specified by the Commission to include the fundamental issue of the quality of its program service and the practical and technical excellence of its facilities and their operation. The Commission declined to make the suggested enlargement because it said that the issues originally announced by it were sufficiently broad to permit the introduction of evidence concerning those aspects of the case. It is perhaps not without significance that at the hearing the Commission's counsel objected to the introduction of evidence by the appellant intended to show that it had served its area well and that it is mechanically and scientifically equipped to do so. Although the trial examiner received the evidence, the Commission made no finding with respect thereto. On this appeal, it is the duty of the court to examine the evidence to see if it furnishes a substantial basis for the Commission's findings of fact, and to see if there is anything material in the evidence which should have been found by the Commission, but which is omitted from its findings. The latter is important because, if the administrative agent fails to find formally some relevant element of the factual situation, there is disclosed the beginning of an arbitrary or capricious conclusion.

The record reveals, not only that the Commission made no finding with respect to the quality of the appellant's service in the past and its equipment for good service in the future, but also that it failed to mention in its findings anything of the value of the property which its decision would render almost valueless. It failed to notice the innocence of Curtis and The Press Company concerning Smith's concealment of Pickard's stock ownership. These things we regard as being material. There is evidence in the record that in 1943 an offer of $75,000 was made for twenty-five percent of the appellants capital stock. This indicates the

value of the stock owned by Curtis and The Press Company which will be largely lost to them should the Commission's decision stand.

When a broadcasting station has been constructed, necessarily at considerable cost, and has been maintained and operated to the satisfaction of its listeners, it is ordinarily in the public interest that the station continue to operate, and a renewal of its license should not be refused unless there exist as a basis for the refusal what this court has called "compelling reasons." Those reasons must be such as bear on the interest of the public, or such as have effect upon its necessity or its convenience; nothing less can be "compelling," and on no other ground does the statute authorize the Commission to deny the renewal.[6]

Under the authority of the Communications Act (Section 312, Title 47, U. S. C.)[7] a station license may be revoked by the Commission for false statements, either in the application or in the statements of fact which may be required under Section 308, or because the statements of fact revealed conditions which would have justified the refusal of a license in the first instance. It may be said, therefore, that the Commission may refuse to renew a license for any similar reason. It seems to us, however, that it is impossible to dissociate the provisions of Section 312 from those of Sections 307 and 309.[8] The latter two sections contain the broad standard that the public interest, convenience, and necessity must be served; and the Commission is directed to grant a license or renewal; once it appears that the public will be served in those particulars. So, a station license may not be revoked,

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[6] Journal v. Federal Radio Comm'n., 60 App. D. C. 92; Chicago Federation of Labor v. Federal Radio Comm'n., 59 App. D. C. 333.

[7] U. S. C., Title 47, § 312 (a): "Any station license may be revoked for false statements either in the application or in the statement of fact which may be required by section 308 of this title, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, or for violation of or failure to observe any of the restrictions and conditions of this chapter or of any regulation of the Commission authorized by this chapter or by a treaty ratified by the United States: Provided, however, That no such order of revocation shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the licensee. Such licensee may make written application to the Commission at any time within said fifteen days for a hearing upon such order, and upon the filing of such written application said order of revocation shall stand suspended until the conclusion of the hearing conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of revocation."

[8] U. S. C., Title 47, § 307 (a): "The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter."

U. S. C., Title 47, § 309 (a): "If upon examination of any application for a station license or for the renewal or modification of a station license, the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe."

under the authority of Section 312, for a false statement in the application unless in exercising a sound discretion the Commission should decide that, because of such false statement, the public interest, convenience, or necessity would be served by a revocation of the license. In reaching such a decision, the Commission must weigh, as it apparently heretofore has done consistently, the competing considerations which enter into the determination of the question whether the public interest, convenience or necessity would be served by a revocation. Any other construction of Section 312 would arm the Commission with arbitrary power to revoke a license for the most inconsequential misstatement by the licensee.

For all the foregoing reasons we conclude that the Commission does not have the power, implied from the provisions of Section 312 or otherwise, to refuse to issue a renewal license because of misstatements of the licensee, unless those misstatements are of such moment as to outweigh all competing considerations, and logically, and rationally to give rise to the conclusion that the public interest, convenience, and necessity would not be served were the license renewed. In other words, the guiding star of the Commission concerning the issue of a station license or a renewal thereof is fixed by the statute as the service of the interest, convenience or necessity of the public. Every specific grant of authority to the administrative agent of the Congress must be used so as to contribute to that service, or it will be correctly characterized as arbitrary, if hurt results to anyone.

Its decision in the present case constitutes a departure from the course which the Commission has taken in dealing with misstatements in applications in other cases. It has not heretofore considered itself bound to refuse to issue a license or a renewal because of misstatements in applications; on the other hand, it has followed the practice of weighing all the elements of each situation presented to it in deciding whether the public interest would or would not be served, were a license or a renewal granted.[9] The doctrine of stare decisis does not apply to decisions of administrative bodies such as the Communications Commission, but radical departures from administrative interpretation consistently followed cannot be made except for most cogent reasons. Indeed it has been said that the adoption by an administrative agency of different standards for similar situations amounts to acting arbitrarily.[10]

The Navarro case (8 F. C. C. 198) is an illustration of the manner in which the Commission heretofore has interpreted the statute as

[9] Navarro Broadcasting Association, 8 F. C. C. 198; Red Lands Broadcasting, 8 F. C. C. 473; In the matter of Panama City Broadcasting Company, 9 F. C. C.

[10] National Labor Relations Board, v. Mali, 119 F. (2d) 700.

to its duty in dealing with misstatements made by applicants for licenses. The Commission revoked the license of Navarro but, after a hearing had subsequent to the order of revocation, set aside that order. The finding was that the applicant had misrepresented its purpose as to the financing, construction, control, and operation of the station, in obtaining the original construction permit and station license. The Commission also found that the members of the original partnership which obtained the construction permit and initial license, had transferred those rights to Ulmer and Terry without the consent of the Commission and in violation of the Act. But, because Ulmer and Terry relinquished their rights to others who proceeded to operate the station in the interest of the public and in full compliance with official regulations, the Commission concluded that "there is nothing in this record to indicate that the respondents, if permitted by this Commission, will not continue to operate in the public interest as they have done since November 1937." The opinion of the Commission then adds the following statement:

"In determining whether to revoke the license of a radiobroadcast station for false representations to the Commission and other violations of the Communications Act, the Commission is faced with competing considerations. The Commission's primary duty is to the listening public and, in dealing with a licensee, the Commission must be guided by this primary duty. On the other hand, if the Commission is to carry out its function of granting and denying applications for licenses, it must obtain true and accurate information from those who seek to operate radio stations and must take disciplinary action against those who make false representations to the Commission. But discipline should not be inexorably applied when station licensees demonstrate to the Commission, as these respondents have now done, that they are ready to act in good faith.

"To revoke their license at this time would deprive the community of the service of this station when there is no reason to believe that the respondents will not continue to operate it in the public interest."

In the case at bar, in a petition for rehearing, the applicant proposed a complete corporate reorganization of WOKO, Inc. The suggested plan included the resignation of all officers and directors who had served as such theretofore; the Phelps stock and other shares aggregating fifty-one percent were to be held by a new corporation controlled by prominent Albany citizens; and such shares as Smith and Curtis would have left were to be placed in a voting trust under the terms of which those individuals would have no voice in a stockholders' meeting. This arrangement, had it been consummated, would have fit into the reasoning of the Commission

in the Navarro case, when it is remembered that the mechanical, scientific and program excellence of the station is not challenged. But the Commission denied the petition for rehearing and adhered to its refusal to renew the license, and so departed from its policy of weighing the "competing considerations" in an effort to find what course will best serve the interest, convenience, or necessity of the public.

Moreover, common justice to the owner of the station, who has devoted a considerable investment to serving the public, requires that for no reason less than a "compelling" one should his physical property be rendered valueless except for what it may bring at a sacrificial sale. It is true, as the appellee points out, that by the terms of the Communications Act, a station license does not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof, nor in any other manner than authorized therein. In spite of the absence of a vested property right in the continuance of the license, however, the Commission may not destroy or diminish the capital investment of the licensee by withholding a renewal of the license, unless in the exercise of a sound discretion it decides that the public interest, convenience, or necessity requires that such a drastic step be taken. The case of Journal v. Federal Radio Commission, 60 App. D. C. 92, was one in which a radio station had been affected injuriously by the assignment of its frequencies to another station. In the course of the opinion Judge Robb, speaking for this court, said:

"The installation and maintenance of broadcasting stations involve a very considerable expense.—Where a broadcasting station has been constructed and maintained in good faith, it is in the interest of the public and common justice to the owner of the station that its status should not be injuriously affected, except for compelling reasons."

If a station should not be injuriously affected save for compelling reasons, certainly it should not be destroyed by a refusal to renew its license for reasons that are less than compelling.

To the same effect is the opinion of this court by Chief Justice Martin in Chicago Federation of Labor v. Federal Radio Commission, 59 App. D. C. 333, 41 F. (2d) 422. The appellant there was applying for a frequency of 770 kilocycles, which already had been granted to Stations WBBM and KFAB. The Commission refused to grant that frequency to the appellant because to do so would have denied the use of it to the two stations already using it. This court affirmed the action of the Commission and said:

"It is not consistent with true public convenience, interest or necessity, that meritorious stations like WBBM and KFAB should be deprived of broadcasting privileges when once granted to them,

which they have at great cost prepared themselves to exercise, unless clear and sound reasons of public policy demand such action. The cause of independent broadcasting in general would be seriously endangered and public interest correspondingly prejudiced if the licenses of established stations should be arbitrarily withdrawn from them, and appropriated to the use of other stations. This statement does not imply any derogation of the controlling rule that all broadcasting privileges are held subject to the reasonable regulatory power of the United States, and that the public convenience, interest, and necessity are the paramount considerations."

Simply stated, the question in this case is whether it is logical and rational to say that a licensee cannot be entrusted with further responsibilities for the sole reason that, over a term of years, one of its officers has concealed from the Commission the identity of a benficial owner of twenty-four per cent of its capital stock. It is conceded that the stockholder whose identity was not revealed was not an alien and, therefore, not disqualified by the express provisions of the statute. It does not appear, as pointed out above, that the concealment influenced or induced the Commission's action in granting license renewals heretofore, nor that the Commission's past decisions which granted renewals would have been different had the identity not been concealed.

The denial of the renewal because of the applicant's failure to show the beneficial ownership of twenty-four per cent of its capital cannot be justified as a penalty for making false statements. The Act does not confer upon the Commission any punitive jurisdiction, and a license or its renewal may not be withheld in order to punish an applicant for violating the Act or a rule or regulation of the Commission. Such violations are to be punished only by the imposition after conviction, of the heavy fines imposed by Sections 501 and 502 of the Act. Nor does the Commission claim the right to punish, but on the contrary disavows any punitive intent here.

So it is manifest that the Commission's decision must depend for validity on the rationality of the step, directly and without any other consideration, from the Commission's well-grounded finding that the real beneficial owner of twenty-four percent of the stock had been concealed from it, to the conclusion that the appellant "cannot be entrusted with the responsibilities of a licensee," and the consequent additional conclusion that the renewal license would not serve the public interest, convenience, or necessity.

We are unable to agree that the step can logically be taken. Other elements must necessarily be weighed. Certainly the condition cannot be upheld as a penalty, for the reason stated heretofore; but the conclusion that the denial of the renewal license

was penal in nature and so intended by the Commission cannot be escaped, for the appellant is the same corporation now which for fifteen years consistently has furnished adequate and satisfactory broadcasting service to its public, and has in all respects met the requirements of law and regulation except in the concealment of stock ownership upon which the Commission based its action. The Commission was quite justified in feeling vexed at the deception, and perhaps would have been justified in seeking criminal prosecution of Smith or of the appellant itself; but to say that this concealment, which did not induce or influence its former grants of renewal licenses, alone supports a conclusion that public interest, convenience, or necessity would not be served by the renewal, is in logic a non sequitur. The high mechanical, scientific and artistic standards maintained by the station, and the highly penal result of the deprivation of a license for a continuance of operation, are necessary considerations in the formation of a judgment as to public interest, convenience, or necessity.

Under the situation disclosed here, we conclude that the Commission acted arbitrarily in proceeding from its warranted conclusion that the stock ownership had been misrepresented to it, to the drastic decision that the continuance of the license would not be in the public interest, with the concomitant results of disestablishing an established and satisfactory radio station and of imposing upon its corporate owner the entire loss of its good will and the serious impairment of the value of its capital assets.

Reversed.

GRONER, C. J., Dissenting:

I regret that I am not in accord with the conclusion reached by the majority. I do, however, very heartily agree with the view that this is a hard case. The Commission's drastic order, terminating the life of the station, punishes the innocent equally with the guilty, and in its results is contrary to the Commission's action in several other comparable cases. But that the making of the order was within the discretion of the Commission, I think is reasonably clear.

Shortly stated, the record shows the WOKO, Inc., acting through its General Manager, who ever since its organization has represented it in all of its transactions with the Commission, deliberately misled the Commission by repeatedly misstating the beneficial ownership of twenty-four percent (24%) of its capital stock. What, if anything, would have happened if the truth had been disclosed is, in my view, not material.

The case, as I think, turns rather upon the question whether the statutory power of the Commission to determine public interest, convenience, or necessity is broad enough to authorize the rejection of a license for renewal for repeated false swearing in statements of fact required to be filed by the Commission's rules

and regulations.[11] An affirmative answer to the question seems to me to be obvious on the grounds of public policy and, accordingly, I do not stop to inquire whether the express statutory authority to revoke impliedly embraces also the power to refuse to renew.[12]

United States Court of Appeals for the District of Columbia

No. 9021—January Term, 1946

WOKO, INCORPORATED, APPELLANT

vs.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

Appeal from the Federal Communications Commission

Before GRONER, C. J., and WILBUR K. MILLER and PETTYMAN, JJ.

(United States Court of Appeals for the District of Columbia. Filed Jan. 21, 1946. Joseph W. Stewart, Clerk.)

Judgment

This cause came on to be heard on the transcript of the record from the Federal Communications Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the decision of the said Federal Communications Commission appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said Federal Communications Commission for further proceedings not inconsistent with the opinion of this Court.

Per Mr. JUSTICE WILBUR K. MILLER.

Dated January 21, 1946.

Dissenting opinion by Mr. Chief JUSTICE GRONER.

United States Court of Appeals for the District of Columbia

No. 9021

WOKO, INCORPORATED, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

(United States Court of Appeals for the District of Columbia. Filed Fed. 14, 1946. Joseph W. Stewart, Clerk.)

Designation of record

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ

[11] 47 U. S. C. § 308.
[12] 47 U. S. C. § 312.

of certiorari in the above-entitled cause, and include therein the following:

1. Joint appendix.
2. Minute entry of argument.
3. Opinion of the United States Court of Appeals for the District of Columbia.
4. Judgment of the United States Court of Appeals for the District of Columbia.
5. Designation of record.
6. Clerk's certificate.

J. HOWARD MCGRATH,
Solicitor General of the United States of America,
ROSEL H. HYDE,
General Counsel,
Federal Communications Commission.
HARRY M. PLOTKIN,
Asst. General Counsel,
Federal Communications Commission.

FEBRUARY 13, 1946.

Acknowledgment of service

Receipt of a true copy of Appellant's "Designation of record" is hereby acknowledged this — day of February 1946.

WILLIAM C. KOPLOVITZ,
Counsel for Appellant.

United States Court of Appeals for the District of Columbia

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered from 1 to 93, both inclusive, constitute a true copy of the joint appendix to the briefs and the proceedings of the said Court of Appeals as designated by counsel for appellant in the case of WOKO, Incorporated, Appellee vs. Federal Communications Commission, Appellee, No. 9021, January Term, 1946, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this twenty-fifth day of February A. D. 1946.

(SEAL)

JOSEPH W. STEWART,
Clerk of the United States Court
of Appeals for the District of Columbia.

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No. [redacted] 65

In the Supreme Court of the United States

OCTOBER TERM, 1945

FEDERAL COMMUNICATIONS COMMISSION,
PETITIONER

v.

WOKO, INCORPORATED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. —

FEDERAL COMMUNICATIONS COMMISSION,
PETITIONER

v.

WOKO, INCORPORATED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of the Federal Communications Commission, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above-entitled cause on January 21, 1946, reversing an order of the Commission denying respondent's application for a renewal of its radio station license.

OPINIONS BELOW

The findings and conclusions of the Federal Communications Commission (R. 30–51) have not yet been reported. The opinion of the United

States Court of Appeals for the District of Columbia (R. 80–94) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 21, 1946 (R. 94). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Communications Act empowers the Federal Communications Commission to deny an application for renewal of a radio station license on the ground that the applicant has wilfully made false statements in applications and reports, has thus indicated that it cannot be entrusted with the responsibilities of a license, and, consequently, that renewal would not serve the public interest, convenience, and necessity.

2. Whether the court below erred in reversing the order of the Commission on the ground that the Commission is required to make findings on other issues even when, upon consideration of the evidence before it, the Commission has concluded that an applicant's character is such that he is not qualified to receive a renewal of his license.

3. Whether, even if the Commission is required to make findings on other issues, the court below improperly required it to take into considera-

tion the effect of a denial of an application for renewal of a license upon the value of the property used in the operation of the station.

STATUTE INVOLVED

The pertinent provisions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U. S. C. 151, *et seq.* (hereinafter referred to as the "Communications Act"), are printed in the Appendix, *infra,* pp. 18–24.

STATEMENT

On October 1, 1942, respondent, WOKO, Incorporated, filed with the Federal Communications Commission an application for a renewal of its license for the operation of radio station WOKO at Albany, New York (R. 9–21); this license had been renewed periodically since a date prior to November 30, 1930 (R. 32). The Commission was unable, upon examination of the application, to determine that public interest, convenience, or necessity would be served by a renewal of respondent's license. Accordingly, it designated the application for hearing upon the following issues (R. 24):

> 1. To determine whether the representations and statements made to the Commission or its predecessor, the Federal Radio Commission, by the licensee, its officers, directors, stockholders, or agents, with respect to the ownership or transfer of, subscription to, or considera-

tion paid for the stock of WOKO, Inc., truly and accurately reflect the facts.

2. To determine all the circumstances and conditions under which the stock of WOKO, Inc., has been issued, transferred, or assigned.

3. To determine whether or not the applicant is qualified to continue the operation of station WOKO.

4. To determine whether, in view of the facts adduced under the foregoing issues, public interest, convenience and necessity would be served by a grant of this application.

Hearings were held in July, August, and September, 1943, before a presiding officer designated by the Commission. The evidence at the hearing disclosed that, since 1930, more than twenty-five applications either for renewal or modification of license had been filed by respondent with the Commission or its predecessor, the Federal Radio Commission. Each application form requested information concerning all stockholders owning and/or voting 10% or more of the applicant's stock and the percentage of stock held by each. The Commission found that, since 1930, Sam Pickard has been the legal or beneficial owner of 24% of the stock of respondent; that when the stock was acquired, Pickard, a former member of the Federal Radio Commission, was a vice president of Columbia Broadcasting System in charge of station relations; that Pickard had acquired the

stock in consideration for his procuring for respondent an affiliation contract with Columbia Broadcasting System; that Pickard had requested respondent not to disclose his stock interest; that in all applications filed by respondent with the Commission and its predecessor since 1930, no disclosure had been made of Pickard's legal or beneficial ownership of 24% of respondent's stock; and that respondent had wilfully misrepresented and concealed the existence of Pickard's stock interest in violation of Section 10 of the Radio Act of 1927, Section 308 (b) of the Communications Act of 1934, and the applicable rules and regulations of both Commissions. (R. 30–47.)

On the basis of these and related subsidiary facts disclosed at the hearing, the Commission concluded that respondent could not be entrusted with the responsibilities of a station licensee and that a grant of its application for renewal of license would not serve the public interest, convenience, or necessity (R. 47–51). Accordingly, an order was entered denying the application for renewal of the license (R. 63–64).

On May 21, 1945, respondent took an appeal from the order of the Commission denying its application for renewal of license to the United States Court of Appeals for the District of Columbia. On January 21, 1946, a divided court reversed the order of the Commission. Justice Wilbur K. Miller delivered the opinion of the

court, in which Justice Prettyman concurred (R. 80–93). Chief Justice Groner dissented in a separate opinion (R. 93–94).

The court below concluded that the Commission "does not have the power * * * to refuse to issue a renewal license because of misstatements of the licensee, unless those misstatements are of such moment as to outweigh all competing considerations, and logically and rationally to give rise to the conclusion that the public interest, convenience, and necessity would not be served were the license renewed" (R. 89). On this premise, the court below held that the Commission's denial was not based on such "compelling reasons" since the Commission had failed to consider and make findings on "the quality of appellant's service in the past, and its equipment for good service in the future" or "the value of the property which its decision would render almost valueless" (R. 81). The court also observed that "it does not appear * * * that the concealment influenced or induced the Commission's action in granting license renewals heretofore, nor that the Commission's past decisions which granted renewals would have been different had the identity not been concealed" (R. 92). The court held further, in effect, that the Commission was precluded from penalizing the respondent by refusing to renew a license because of false statements made by it, since Sections 501 and 502 provided penalties for any violation of the

provisions of the Act or of any rule or regulation of the Commission (R. 92).

Chief Justice Groner dissented in a separate opinion (R. 93–94). He was of the view that it was "obvious on the grounds of public policy" that the Commission had authority under the Communications Act to refuse to renew the license of an applicant "for repeated false swearing in statements of fact required to be filed by the Commission's rules and regulations." Pointing out that the record shows that respondent deliberately misled the Commission, he concluded that the order was within the discretion of the Commission. He observed that "what, if anything, would have happened if the truth had been disclosed is, in my view, not material" (R. 93).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the Commission does not have authority, under the Communications Act of 1934, to deny an application for renewal of license solely on the ground that the applicant is not qualified because it has deliberately made false statements to the Commission.

2. In substituting its own judgment and discretion for that of the Commission in holding that the Commission's findings were not sufficient to support its conclusion that respondent was not qualified to continue as a station licensee.

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3. In resting its decision upon its own findings on issues on which the Commission made no findings, and found it unnecessary to do so.

4. In finding that two of respondent's stockholders had no knowledge of the misrepresentations made to the Commission, despite the Commission's express finding that it could draw no such inference from the evidence.

5. In holding that the Commission is required to take into consideration the effect of a denial of an application for renewal upon the value of the property used in the station's operation.

6. In holding, in effect, that, because Sections 501 and 502 provide penalties for violation of the provisions of the Communications Act of 1934 or of any rule or regulation of the Commission, the Commission is precluded from denying a renewal of a license because of false statements made by the applicant.

7. In failing to affirm the Commission's order.

REASONS FOR GRANTING THE WRIT

1. The opinion of the court below imposes limitations on the Commission's licensing authority which are clearly in conflict with the provisions of the Communications Act and the decisions of this Court and which would seriously impair performance of the licensing and regulatory functions entrusted to the Commission. And since the court below has, under Section 402 (b) of the Act, exclusive jurisdiction of appeals from Com-

mission decisions granting or denying station licenses or renewals of licenses, it is of especial importance for the proper administration of the Act that any serious error in defining the Commission's licensing powers be corrected by this Court.

The decision of the court below would preclude the Commission from denying an application for renewal of license on the ground that the applicant was not qualified, even when evidence adduced at a hearing enabled the Commission to conclude that his character was such that he could not be entrusted with the duties and responsibilities of a licensee. The same result must also follow in the case of an original application, since Section 307 (d) of the Act provides that the "action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications."

The consequence of the Court of Appeals' holding is that the Commission, in passing on renewal applications, will be required to consider other factors such as past program service rendered by an applicant and the adverse effect which a denial of such renewal would have on the value of property used by the applicant for broadcasting purposes, and further that the

Commission may refuse to renew only where considerations relating to the character of the applicant "are of such moment as to outweigh all competing considerations" (R. 89). But nothing in the Act warrants this interpretation. Indeed, the provisions of the Act itself and the holdings of this Court and the court below in other cases involving the licensing provisions of the Act make it clear that this interpretation is untenable. Section 308 (b) of the Act expressly provides that the character of an applicant is a material qualification for the granting of a license or a renewal. The Act does not require the Commission to consider other grounds when it is satisfied that one ground is a sufficient basis for a denial of a license. Nor can the requirement that the Commission's licensing powers be exercised in the light of the criterion of the public interest, convenience and necessity be so construed. This Court has passed on that very issue in the case of *National Broadcasting Company* v. *United States,* 319 U. S. 190. In that case, the Court held that the Commission could deny an application for renewal of a license where it found that an applicant's network affiliation contract contained features which the Commission found were not in the public interest. Similarly, the Court of Appeals itself has held that where the Commission finds that one ground is a sufficient basis for the denial of a license, it need not consider others. *Simmons* v. *Federal*

Communications Commission, 145 F. 2d 578 (App. D. C.). See also, *Greater Kampeska Radio Corp.* v. *Federal Communications Commission*, 108 F. 2d 5 (App. D. C.).

2. In holding that the findings of the Commission do not support its conclusion that respondent is not qualified to receive a renewal of license, the court below has clearly overstepped the boundary between the judicial and the administrative function, and has substituted its own judgment for that of the Commission on a matter entrusted to the discretion of the Commission by the Communications Act.

As shown above, the Act does not forbid the Commission to deny a license on some single ground; it simply provides (Section 402 (e)) that Commission action is subject to reversal if "it shall clearly appear that the findings of the Commission are arbitrary or capricious." But the Commission's determination that respondent is unqualified because of its continued concealments and misrepresentations cannot be said to be so clearly arbitrary and capricious as to warrant reversal by the reviewing court. On the contrary, consideration of the undisputed facts in this case and the obvious relevance of good character to the performance of a licensee's duties both to the public and to the Commission demonstrate the correctness of the Commission's action.

It is reasonable for the Commission to make the determination that good character is an essential qualification of a radio station licensee. As has been pointed out, Section 308 of the Act expressly so provides, and it can hardly be disputed that veracity and integrity are indispensable elements of good character. That section also makes it clear that the information relating to character and other qualifications which is filed with the Commission by the applicant is designed for the very purpose of assisting the Commission in determining whether or not an application should be granted or denied or a license revoked. In addition, Section 312 (a) expressly provides that a license may be revoked for false statements in either an application or any other disclosure required by the Commission under Section 308 of the Act. The suggestion, in the opinion of the court below, that the Commission would be acting arbitrarily if it denied or revoked a license because of false statements, however trivial and inconsequential (R. 89), has no pertinence to the present case. For the wilful concealment over a twelve-year period of a 24% interest in respondent, acquired by an officer of a network organization, as consideration for doing what he was employed by the network to do, could not reasonably be characterized as trivial or inconsequential. The Commission, in the exercise of its discretion under the statute, has de-

termined that these false statements are of consequence and that respondent's past conduct reveals that it is not qualified to continue as a station licensee (R. 47–51).

It is evident that the Commission can properly exercise its licensing and other functions only if it receives adequate and truthful information from applicants and licensees. There are more than 900 standard broadcast stations presently licensed by the Commission, and in the near future there will be hundreds of television stations and several thousands of frequency modulation stations. Licenses for all of these stations have been or will be authorized to a great extent upon the basis of a showing made in the applications. Renewals are granted on the same basis. If a detailed investigation were required to determine the accuracy of the representations contained in each of the thousands of applications received annually, an intolerable burden would be imposed upon the Commission and would seriously impede, if not prevent, the normal operations of the Commission.

Under these circumstances, it can hardly be said that the refusal to renew the license of an applicant who, over a period of twelve years, wilfully filed false and misleading statements with the Commission is arbitrary or capricious. Since this determination is within the scope of the Commission's statutory power and represents a rea-

sonable exercise of the Commission's discretion, the court below, in coming to a contrary conclusion, has improperly substituted its discretion for that of the Commission. Indeed, the opinion of the court below, on its face, reveals the extent to which it has overstepped the proper boundary of its judicial competence. Thus, although the court itself expressly points out in its opinion that the Commission made no findings with respect to respondent's program service, the court goes on to make its own findings of fact on that subject. At one point it speaks of the "reasonably satisfactory" service rendered by respondent (R. 87), at another, of its "adequate and satisfactory" service (R. 93), and, at yet another, of "the high mechanical, scientific and artistic standards maintained by the station" (R. 93). The court criticizes the Commission's alleged failure to take into consideration the innocence of respondent's stockholders other than the one who prepared and signed the applications and reports involved (R. 87), despite the Commission's express finding that it was unable to conclude that those stockholders had no knowledge of the facts (R. 49–50).

These are but details which emphasize the extent to which the court below has exceeded the scope of its judicial competence and has invaded the sphere of administrative discretion, contrary

to the repeated admonitions of this Court. See *Rochester Telephone Company* v. *United States*, 307 U. S. 125, 146. See also, *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U. S. 134, 144–145.

3. In holding that the Commission should have taken into consideration the effect of the denial of an application for renewal of license upon the value of the property used in the operation of the respondent's station, the court below, while protesting the contrary, has, in effect, attempted to create property rights in a license. But the suggestion of the court below that the Commission's discretion in the exercise of its statutory powers is limited because of the existence of substantial investments ignores express provisions of the Act. For the existence of such property rights in a license is expressly negatived by the provisions of Sections 301, 304, 307 (d) and 309 (b) of the Communications Act. Indeed the limited nature of the rights conferred by a license is emphasized by Section 304 which makes it clear that a licensee can acquire no right to the use of a frequency paramount to the regulatory power of Congress, which, under the Communications Act, has been delegated to the Commission. See *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, 475, and *Ashbacker Radio Corporation* v. *Federal Communications Commission*, No. 65, this Term, decided December 3, 1945.

4. In its opinion, the court below states that the denial of a renewal because of applicant's concealments and misrepresentations cannot be justified as a penalty for making false statements. This statement lends no support to its decision. For, clearly, a refusal to renew a license does not constitute a penalty in the same sense as the imposition of a fine or imprisonment. To characterize as a penalty the withholding of a valuable privilege by refusal to renew a license because of past conduct, which may also be punishable under other provisions of law, would be entirely destructive of administrative discretion to consider such conduct when it is relevant to an applicant's qualifications to be a licensee. That very issue was considered in the case of *National Broadcasting Company* v. *United States*, 319 U. S. 190, 222–223, in which this court held that the fact that conduct of a licensee may be violative of and punishable under the provisions of the anti-trust laws, does not bar the Commission from considering such conduct in a licensing proceeding when it is relevant to the statutory criterion of the public interest, convenience and necessity.

5. The holding of the court below not only seriously impairs the licensing powers of the Commission under the provisions of the Communications Act, but is also likely to have an equally restrictive effect upon the licensing powers of other federal agencies. The rationale of the opinion is equally applicable to every situation in

which the good character of an applicant is deemed a necessary qualification for the grant of a license. Other licensing and regulatory agencies must, as in the case of the Commission, be able to rely upon the correctness and completeness of the information furnished by applicants and licensees. Therefore, the major issues presented by the court's decision are of general importance in the field of federal administrative law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. HOWARD MCGRATH,
Solicitor General.

ROSEL H. HYDE,
General Counsel,
Federal Communications Commission.

MARCH 1946.

APPENDIX

Communications Act of 1934, c. 652, 48 Stat. 1064, as amended May 20, 1937, c. 229, 50 Stat. 189, 47 U. S. C. 151, *et seq.*:

SEC. 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communica-

tions, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

* * * * *

SEC. 304. No station license shall be granted by the Commission until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

* * * * *

SEC. 307. (d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to the granting of such application for the renewal of a

license shall be limited to and governed by the same considerations and practice which affect the granting of original applications.

* * * * *

SEC. 308. (a) The Commission may grant licenses, renewal of licenses, and modification of licenses only upon written application therefor received by it: *Provided, however,* That in cases of emergency found by the Commission, licenses, renewals of licenses, and modifications of licenses, for stations on vessels or aircraft of the United States, may be issued under such conditions as the Commission may impose, without such formal application. Such licenses, however, shall in no case be for a longer term than three months: *Provided further,* That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

(b) All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the

term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

* * * * *

SEC. 309. (b) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

(1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein.

(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act.

(3) Every license issued under this Act shall be subject in terms to the right of use or control conferred by section 606 hereof.

* * * * *

SEC. 310. (b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full

information, decide that said transfer is in the public interest, and shall give its consent in writing.

* * * * * *

SEC. 312. (a) Any station license may be revoked for false statements either in the application or in the statement of fact which may be required by section 308 hereof, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, or for violation of or failure to observe any of the restrictions and conditions of this Act or of any regulation of the Commission authorized by this Act or by a treaty ratified by the United States: *Provided, however,* That no such order of revocation shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the licensee. Such licensee may make written application to the Commission at any time within said fifteen days for a hearing upon such order, and upon the filing of such written application said order of revocation shall stand suspended until the conclusion of the hearing conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of revocation.

* * * * * *

SEC. 402. (e) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a

judgment affirming or reversing the decision of the Commission, and in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 240 of the Judicial Code, as amended, by appellant, by the Commission, or by any interested party intervening in the appeal.

* * * * * *

SEC. 501. Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this Act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this Act required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than $10,000 or by imprisonment for a term of not more than two years, or both.

SEC. 502. Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this

Act, or any rule, regulation, restriction, or condition made or imposed by any international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs.

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No. 65

In the Supreme Court of the United States

OCTOBER TERM, 1946

FEDERAL COMMUNICATIONS COMMISSION,
PETITIONER

v.

WOKO, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

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BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

OPINIONS BELOW

The findings and conclusions of the Federal Communications Commission (R. 23–38) have not yet been reported. The opinion of the United States Court of Appeals for the District of Columbia (R. 59–73) is reported in 153 F. 2d 623.

JURISDICTION

The judgment of the Court of Appeals was entered on January 21, 1946 (R. 73). The

petition for a writ of certiorari was filed on March 19, 1946, and was granted on April 22, 1946 (R. 58). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Communications Act empowers the Federal Communications Commission to deny an application for renewal of a radio station license on the ground that the applicant has wilfully made false statements in applications and reports, has thus indicated that it cannot be entrusted with the responsibilities of a license, and, consequently, that renewal would not serve the public interest, convenience, and necessity.

2. Whether the court below erred in reversing the order of the Commission on the ground that the Commission is required to make findings on other issues even when, upon consideration of the evidence before it, the Commission has concluded that an applicant's character is such that it is not qualified to receive a renewal of its license.

3. Whether, even if the Commission is required to make findings on other issues, the court below improperly required it to take into consideration the effect of a denial of an application for renewal of a license upon the value of the property used in the operation of the station.

STATUTE INVOLVED

The pertinent provisions of the Communications Act of 1934, 48 Stat. 1064, as amended 47 U. S. C. 151, *et seq.* (hereinafter referred to as the "Communications Act"), are printed in the Appendix, *infra*, pp. 53–59.

STATEMENT

This case arises upon the application for renewal of its station license, filed by the respondent with the Commission, and dated September 28, 1946 (R. 7–17).[1] Upon consideration of the respondent's application, the Commission was unable to determine that public interest, convenience, or necessity would be served by a renewal, and, accordingly (see Section 309 (a) of the Communications Act, Appendix, *infra*, p. 56) it designated the application for hearing upon the following issues (R. 18):

> 1. To determine whether the representations and statements made to the Commission or its predecessors, the Federal Radio Commission, by the licensee, its officers, directors, stockholders, or agents, with respect to the ownership or transfer of, subscription to, or consideration paid for the stock of WOKO, Inc., truly and accurately reflect the facts.

[1] There were, in fact, two applications: one for the main station (R. 7) and one for the auxiliary transmitter (R. 12). See R. 18. For purposes of this case, they may be treated as one.

2. To determine all the circumstances and conditions under which the stock of WOKO, Inc., has been issued, transferred or assigned.

3. To determine whether or not the applicant is qualified to continue the operation of Station WOKO.

4. To determine whether, in view of the facts adduced under the foregoing issues, public interest, convenience, and necessity would be served by a grant of this application.

The respondent filed a notice of appearance (R. 20) and a petition to amend and enlarge the issues (R. 20–22). In its petition, the respondent sought to bring within the scope of the hearing (1) the past and proposed nature, character and extent of its program service; and (2) the past and proposed "nature, character and extent of the activities and/or policies of the licensee, its officers, directors, stockholders, agents, and/or employees, with respect to the operation of the station, the public service rendered thereby, and the response of the public to such activities and/or service" (R. 20–21). By order of June 30, 1943 (R. 22–23), the Commission denied this petition on the ground that "the hearing issues now designated by the Commission are broad enough to permit, within reasonable bounds, the introduction of the evidence suggested by the proposed issues of the petitioner, and that the

requested amendment and enlargement of the hearing issues is therefore unnecessary."

Hearings were held in July, August, and September 1943, before a presiding officer designated by the Commission (R. 23, 39). On March 27, 1945, the Commission denied the application (R. 47). The grounds of the Commission's decision were that respondent could not be entrusted with the responsibilities of a licensee because of its continued concealment of facts and misreprentation in its applications and testimony before the Commission over a period of years (R. 35–38). The findings and evidence on the basis of which the Commission was enabled to reach this conclusion may be summarized as follows:[2]

I. The organization and ownership of the respondent

Respondent, WOKO, Incorporated, a corporation chartered under the laws of the State of New York (hereinafter referred to as WOKO) is a licensee of a radio broadcasting station in the City of Albany, New York (R. 23; Tr. 46, 47). Prior to November 1930, station WOKO was located first at Peekskill and later at Pough-

[2] In the following summary, record references (R. —) preceding the semicolon are to the Commission's findings, set out in the printed record, and the succeeding references (Tr. —) are to the evidence supporting the findings, set out in the administrative record transmitted to this Court as an original document.

keepsie, New York, and was licensed to Harold E. Smith and Raymond M. Curtis, co-partners, doing business as The Hudson Valley Broadcasting Company (R. 24; Tr. 47). The operation of the station at Poughkeepsie was a losing venture, and Curtis, unwilling to continue to pay his share of the losses, suggested that the station license be surrendered (R. 24; Tr. 49, 50). Smith, however, seeing the possibility of bettering the financial position of the station by securing a network affiliation for it, went to New York in the latter part of 1929 for that purpose. While in New York, he visited only the Columbia Broadcasting System (hereinafter referred to as CBS). (R. 24; Tr. 51.) At CBS, he approached Sam Pickard, who, from 1928 to 1929, had been a member of the Federal Radio Commission,[3] and, at the time of Smith's visit, was Vice President in charge of station relations for CBS (R. 24; Tr. 51–54).[4]

At their first meeting, Pickard advised Smith

[3] See R. 61.

[4] As such, Pickard was—to Smith's knowledge—entrusted by CBS with the duty of entering into contracts with broadcasting stations seeking affiliation with this network, when he deemed such affiliation advantageous to CBS. In this respect, it was Pickard's official duty to be helpful "to all stations and to build up a network," to discuss with the affiliates the question of bettering their frequencies, their hours, their location, etc. Pickard retained that position with CBS until 1936 and thereafter occupied an advisory position, on a part-time basis, with this network (Tr. 51–54, 157, 216, 218–220).

that CBS would not be interested in the station as long as it was located at Poughkeepsie, and suggested that it be moved to Albany and that authority also be secured to operate it full time. If this were done, he stated, CBS would be interested in having WOKO as an affiliate. (R. 24; Tr. 53.)

Smith was unable, and Curtis unwilling, to finance the contemplated move from Poughkeepsie to Albany. Accordingly, Smith, with Curtis' approval, went to Albany and conferred with a representative of The Press Company, Inc., which was the publisher of the Albany Evening News and the Knickerbocker Press, in order to interest The Press Company in giving financial assistance to the station if it should move to Albany. During this conference, the representative of The Press Company was informed of the conference with Pickard concerning possible Columbia affiliation and unlimited time operation. (R. 24–25; Tr. 54–57.)

After a second meeting in Albany between Smith and representatives of The Press Company, Inc., it was tentatively agreed that a corporation with 1,000 shares of capital stock should be organized, 250 shares to be issued and held as treasury stock subject to an option to purchase by The Press Company, and the remaining 750 shares to be isued in equal amounts to Smith and Curtis. It was agreed further that the proposed corporation should borrow $30,000 (later

increased to $35,000) from the National Commercial Bank and Trust Company at Albany, New York, on its corporate note endorsed by The Press Company, and that the Smith and Curtis stock should be held by The Press Company as collateral security for its endorsement. (R. 25; Tr. 54–67.)

During the course of these negotiations, Pickard was kept fully advised by Smith concerning all matters relating to the proposed move of Station WOKO to Albany. Following the tentative agreement with The Press Company, Smith received a preliminary contract dated August 12, 1930, and signed by Pickard as Vice President of Columbia, in which it was stated that Columbia service would be made available to Station WOKO, if and when it moved to Albany. (R. 25; Tr. 61, 66, 69, 70, Applicant's Exh. 2.)

At one of the many conferences held between Smith and Pickard, concerning the proposed removal of WOKO to Albany, and before the tentative agreement with The Press Company had been consummated in a final agreement, Pickard suggested to Smith that he, Pickard, be given an "interest" in the station. After some deliberation concerning the amount of this interest, it was agreed between Smith and Pickard in the latter part of 1929, or in the first part of 1930, that Pickard should be given a 24% interest (240 shares) in the contemplated corporate licensee,

Pickard to receive 14% of the shares, and Lawrence Lowman, another Vice President of CBS, to receive the remaining 10%. In "consideration" of this 24% interest in the corporation to be chartered, Pickard promised (1) to secure an affiliation contract between CBS and the station if and when it would be moved to Albany; (2) to furnish, without charge, experienced CBS engineers to assist in erecting the new station at Albany; (3) to help in obtaining studio space, and (4) to supply a good piano and also newspaper publicity at the time of the opening of the station at Albany. Smith testified that he informed Curtis of all details concerning his conferences with Pickard. (R. 25–26, 37; Tr. 77–87, 422, 429–430, 485.)[5]

When Pickard first asked that he be given shares in the prospective corporation, he expressed his desire that his interest in the corporation be not disclosed, saying that any disclosure would be "most embarrassing to him at the Columbia offices". Smith testified that he did not inquire into the reasons for his alleged (or real) embarrassment in case of disclosure because "after all Mr. Pickard was Vice President of CBS and a former member of this body", but that

[5] After the affiliation contract was executed, the services of the CBS engineers were furnished. However, it was then agreed between Pickard and Smith that WOKO would be given the piano in return for payment by the corporation for the newspaper publicity (R. 26; Tr. 437, 438).

he, Smith, had his "surmise". (R. 30–31; Tr. 115, 116, 228, 500–503.)

The Press Company was informed of Pickard's prospective interest in the station. Smith's arrangement with Pickard under which Pickard was to receive an interest in the station in return for his efforts in securing an affiliation contract with CBS was "perfectly agreeable * * * because they [The Press Company's representatives] thought it would materially aid and assist WOKO in establishing the Columbia contract. * * *" (R. 24–25; Tr. 82, 83, 485.)

The tentative agreement between The Press Company and Smith and Curtis was embodied in a written contract dated December 3, 1930, which, in turn, was superseded by an agreement between The Press Company and the respondent dated January 15, 1931. Incorporated on December 9, 1930, with Smith, Curtis, and the managing editor of The Press Company as incorporators and also the first directors, the respondent had an authorized capital stock of 1,000 shares without par value, of which 750 shares were issued to Smith and Curtis in equal amounts and 250 shares retained in the corporate treasury subject to The Press Company's option. Smith's and Curtis' shares were issued in certificates of 255, and, in order that the 240 shares could be conveniently endorsed to Pickard and Lowman, of 70 and 50 each. In fulfillment of Smith's agreement with

Pickard, Smith and Curtis turned over the 240 shares to Pickard and Lowman, endorsing 140 shares to Pickard and 100 shares to Lowman. (R. 26–27; Tr. 67–85). Pickard and Lowman deposited their shares with The Press Company, immediately upon endorsement to them, as part of the collateral for The Press Company loan to respondent. A formal affiliation agreement between WOKO and CBS was executed on December 18, 1931, after the 240 shares had been issued to Pickard and Lowman personally on October 23, 1931 (R. 26–28; Tr. 99, 100, 430, 431, 433).

The manner in which these transactions were carried on reflected the nature of the relationship existing between Pickard and the partners, Smith and Curtis. The latter feared that Pickard, once having been given the 24% of the prospective corporation's stock, might not procure the affiliation contract from CBS;[5] Pickard, on the other hand, was afraid that the partners might not give him the 24% as promised *after* he con-

[5] Smith testified as follows: "The Presiding Officer: Now, the attorney wants you to tell the Commission why it was that these original stock certificates were issued in the name of yourself and Mr. Curtis in place of being issued at that time to Mr. Pickard and Mr. Lowman. The Witness: Well, the answer is that the reason was that we were not going too far with this arrangement with Mr. Pickard until *we had positive assurance that we were going to secure a fulltime Columbia contract* * * * *I wanted to be assured of Mr. Pickard's good faith and good intentions.* * * * to give us a fulltime Columbia service in Albany" (Tr. 430, 433) (italics supplied).

tributed his share, *i. e.*, the affiliation contract (R. 28).[7] Therefore, it was agreed initially to issue the 24% in Smith's and Curtis' name, to endorse the certificates to Pickard and Lowman as evidence of their right, and then to deposit them with The Press Company pursuant to the terms of the loan agreement (R. 28; Tr. 99, 100, 430, 431).

Upon repayment of the loan by respondent in August, 1932, all of the stock held as collateral by The Press Company was delivered to the holders of record. A new certificate for the entire 240 shares was issued to Mrs. Pickard, since Lowman and Pickard had previously transferred their shares to Mrs. Pickard. She immediately endorsed the certificate over to Smith with an agreement between Smith and Pickard whereby Smith was to hold the stock for the Pickards. On February 2, 1933, a new certificate for 240 shares was issued in Smith's name, endorsed by him in blank and forwarded to Pickard on the same date.

[7] In this respect, Smith testified as follows: "A. The idea was that the certificates were to be endorsed and returned to The Press Company. Q. Were there any reasons in connection with that? A. Yes. Q. What were they? A. Because we had not as yet met our obligations with the bank and all this stock was still held in escrow. Q. Did they (Pickard and Lowman) make any requests of you that they wanted evidence of their stock? A. That is exactly the reason this last issuance was made. It was merely proof of Mr. Curtis and mine that The Press Company had good faith" (Tr. 99, 100).

Smith continued as holder of record of these shares until June 18, 1934, when, upon instructions from Pickard, the certificate was cancelled and three new certificates for 80 shares each were issued to Mrs. Pickard, the Esspick Corporation, and the Sampick Corporation, two holding companies controlled by the Pickards. These certificates, in turn, were surrendered on July 2, 1934, and a certificate for 240 shares issued in the name of R. K. Phelps, a brother-in-law of Pickard, in whose name the stock has remained; it has been so reported to the Commission continuously to the date of the hearing. (R. 26–29; Tr. 107–114, 117–121, 1191, 1195.)

After the respondent filed with the Commission its application for the renewal of its license, a member of the Commission's Law Department made an official visit to Station WOKO in December, 1942, and requested the permission of Smith to examine his correspondence with Mr. Pickard relative to the Phelps stock. A search of the files disclosed only a copy of a letter from Smith to Pickard found in the "Phelps" file. Smith maintained that he could "not recollect any particular correspondence." Thereafter, some such correspondence was found at various places and Smith produced part of it. The explanation offered by Smith concerning some of it being found at his home and not in the station's files was: That a Mr. Richardson was in charge of the filing; that

he (Smith) had received very little correspondence from Mr. Pickard; that he had been confined to his home by illness in 1938 and that such correspondence might have been referred to him there; or that on occasions letters from Mr. Pickard may have been carried home by him as they were of a personal nature; and that such letters were inadvertently not returned to the office. (R. 33–34; Tr. 1129–1136.)

II. The respondent's statements to the Commission

The evidence disclosed that in twenty-nine applications, filed with the Federal Communications Commission and its predecessor, the Federal Radio Commission, since 1931, the respondent misrepresented the ownership of the 24% stock interest as follows: Each application form requested information concerning all stockholders owning and/or voting 10% or more of the applicant's stock and the percentage of stock held by each. The earlier applications uniformly stated that 75% of the stock was owned by Curtis and Smith in equal shares and that the remaining 25% was either held in the treasury or by The Press Company. No mention was made in any of these applications of the fact that 240 shares, or 24%, of the stock had been assigned by Smith and Curtis to Pickard or his nominee. (R. 31–32; Tr. 251–253, Commission's Exhibit 1.) At the hearing, Smith admitted that representations

made to the Federal Radio Commission in various applications between October 23, 1931, and July 1934, and specifically in an application for renewal of license dated July 26, 1932, relative to the stock distribution of the applicant were not true (R. 31–32; Tr. 519–526).

The evidence showed further that on November 6, 1933, Smith testified at a hearing involving an application by WOKO for a modification of its license (Docket No. 1899). In response to a question as to who owned the stock of WOKO, Inc., he answered: "Harold E. Smith, 50%; R. M. Curtis, 25%, and The Press, 25%." On that date, however, the stock was held as follows: Curtis, 25½%, The Press Company, 25%; Smith 25½% in his own right and 24% as trustee for Pickard. Smith did not disclose the fact that Pickard was the beneficial owner of 24% of respondent's stock. Yet in the instant proceeding, Smith admitted that on February 2, 1933, he had endorsed in blank a certificate representing those 240 shares and had sent it to Pickard in whose possession it remained at the time of the hearing. Similar false testimony by Smith was given at other hearings also. (R. 33; Tr. 107–111, 488–496, 520, *et seq.*)

In the hearings involved in this case, Smith denied that he had knowledge of the fact that the Pickards were the beneficial owners of the 24% of the stock registered in the name of R. K.

Phelps since July 2, 1934, until Pickard so informed him in a letter dated June 15, 1942. However, evidence in the record consisting of correspondence between Smith and Pickard between the years 1934 and 1941, conclusively establishes that Smith did have knowledge of the identity of the actual owners. (R. 34–35, 37.) [8]

[8] Pickard's continuing contact with the affairs of the Corporation, as well as Smith's knowledge of the true ownership of the Phelps shares, is revealed by the following excerpts from the correspondence between Smith and Pickard, as set out in the Commission's findings (R. 34–35):

Smith to Pickard, 6/17/38, "At a director's meeting yesterday a dividend of $14.00 per share was declared. Enclosed is a check covering. While it may not pay off the mortgage on the old home, it ought to help a bit!" (Tr. 1292.)

Pickard to Smith, 10/8/38. "My chief worry is that we might lose CBS to a better station in that locality. I wonder if you and Curtis should go in and try to get our contract extended for a couple of years longer. If you want I will feel this situation out also." (Tr. 1295.)

Smith to Pickard, 10/12/38. "Of course, anything you can do to assist in connection with WOKO will be merely protecting your own interests as well as the corporation's." (Tr. 1293.)

Pickard to Smith, 7/7/39. "* * * As I recall, you have always been consistent with a dividend check about this time of year. * * * How about declaring out what you can spare? About all the small stockholders can do is to let out a little squawk occasionally. * * * You should think twice before spending beyond our capital reserve." * * * (Tr. 1301.)

* * * * * *

Smith to Pickard 12/29/39. "In regard to your stock now in the name of R. K. Phelps, as long as this matter has been placed before the Collector of Internal Revenue of Kansas City, don't you think it might be just as well to straighten

III. The Commission's conclusions and the subsequent proceedings

On the basis of these facts, the Commission concluded that since October 23, 1931, Sam Pickard or his wife, Francke Pickard, or both, or corporations which they controlled, were the real owners of 240 shares of the common stock of respondent, amounting to 24% of its capital stock; that the respondent misstated and concealed these facts

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the thing out at this end and transfer the stock to the name of Francke Pickard. * * *" (Tr. 1304.)

* * * * *

Smith to Pickard, 5/7/40, requesting Mr. Pickard's assistance concerning Columbia contract. "You can do a lot in this situation and I urge you to give us your help, in self interest, and for the sake of the station." (Tr. 1321.)

Pickard to Smith, 5/17/40. "I have a substantial interest in the business and naturally feel it a constant loss not having the opportunity to see you more often and learn more intimately what is going on. I am glad to see our statements reflecting improvement and hope that we can soon be out of debt as I feel that in these times a large back-log of reserve is essential." (Tr. 1320.)

Smith to Pickard, 5/21/40. "You mention your substantial interest in the affairs of WOKO. That is quite correct and applies as well to Raymond Curtis, The Press Company, Inc., and myself." (Tr. 1316.)

Smith to Pickard, 1/2/41. "At the annual directors meeting a dividend of $27.50 per share was declared, payable January 2, and I am enclosing a check for $6,400. Have you been able to do anything in regard to the transfer of WOKO stock? With the Commission tightening up its regulations and inquiring into every last detail, I feel very strongly that this matter should be taken care of without further delay." (Tr. 1327.)

in its reports to the Commission and to its predecessor, the Federal Radio Commission, in violation of Section 10 of the Radio Act of 1927, Section 308 (b) of the Communications Act of 1934, and the rules and regulations of both Commissions; that the performance of its statutory duties requires that the Commission have full information about each of an applicant corporation's stockholders, and that the failure to disclose that the Pickards were stockholders in respondent prevented a determination of their qualifications and fitness under the Communications Act; that this concealment was not inadvertent but was wilful, and that there was no basis for concluding that the directing officers of the respondent corporation did not know the identity of the real owner of the stock listed and reported as owned by R. K. Phelps (R. 35–37). The Commission, therefore, concluded that respondent could not be entrusted with the responsibilities of a station licensee and that a grant of its application for renewal of license would not serve the public interest, convenience, or necessity (R. 38). Accordingly, an order was entered denying the application for renewal of the license (R. 47).

In an opinion and order dated April 24, 1945, the Commission granted, upon respondent's application, a special temporary authorization for the continued operation of WOKO until May 2, 1945 (R. 51–52). On April 28, 1945, respondent filed a petition for rehearing (R. 52–57) which

was denied on May 1, 1945 (R. 58). Respondent has been operating WOKO since that time on special temporary authorization.

On May 21, 1945, respondent took an appeal from the order of the Commission denying its application for renewal of license to the United States Court of Appeals for the District of Columbia (R. 1–7). On January 21, 1946, a divided court reversed the order of the Commission. Mr. Justice Wilbur K. Miller delivered the opinion of the court, in which Mr. Justice Prettyman concurred (R. 59–72). Chief Justice Groner dissented in a separate opinion (R. 72–73).

SUMMARY OF ARGUMENT

I

The Communications Act authorizes the Commission to refuse to renew a license because of repeated concealments and misrepresentations made by a licensee to the Commission. Section 308 of the Communications Act requires that all applicants for a license or renewal shall be in writing and must be sworn to by the applicant, and indicates that one of the purposes to be served by such a written application is to enable the Commission to give consideration to the character of an applicant. Under Section 312 (a) of the Act, the Commission is given authority to revoke any station license for false statements in the application or in other statements of fact

required by the Commission pursuant to Section 308 (b). Section 307 (d) of the Act makes it clear that the importance of these elements is undiminished where application is made for renewal of a license previously granted. These provisions of the statute demonstrate that the fact that wilful concealments and misrepresentations might also be criminally punishable does not bar the Commission from considering such conduct as a relevant factor in a license renewal proceeding.

It is necessary that the Commission be able to rely upon the truth of representations made to it. Consequently, there is no merit to the suggestion of the court below that there was some impropriety in the Commission's failure to make findings as to what action it might have taken had it known the truth, and as to how the misstatements influenced the Commission in the exercise of its licensing power. Moreover, an inquiry along the line suggested by the court below would be totally irrelevant to the question of the character of the applicant. Since the concealment of information is a sufficient basis for agency action terminating a license, there is no necessity for inquiry as to what effect the concealed information might have had if it had been made available to the agency.

Nor can error be attributed to the Commission on the ground that it failed to find that two of

the four stockholders, who were also among the first directors of WOKO, knew that the general manager, Smith, was withholding information from the Commission. The Commission found that it "would be credulous indeed to accept without question representations that the directing officers" of WOKO did not know that Pickard was the real owner of a 24% interest in WOKO "reported as owned by R. K. Phelps over an eight-year period," and, pointed to circumstances from which it could be concluded that they knew of the deceptions. More fundamentally, however, a finding on this question was unnecessary, for the innocence of particular stockholders cannot absolve the corporation from responsibility for wrongful acts of the corporation's managing officer.

In the light of these considerations, it was reasonable for the Commission to conclude from the undisputed findings of persistent and wilful misstatements and concealments of facts essential to full consideration by the Commission of the applicant's qualifications, that the respondent was unfit to be entrusted with the responsibilities of a licensee.

II

The court below erred in holding that the Commission was required to make findings concerning respondent's program service, the value of its property, and other factors before reaching a

conclusion as to whether or not a renewal of respondent's application would be in the public interest. There is nothing in the Communications Act to suggest that the Commission must make findings on all of the numerous factors which may be within the scope of the criterion of the public interest when is it able to reach a conclusion on the basis of its finding on one or a limited number of factors that the grant of a license would not be in the public interest. And when the Commission is able to conclude on the basis of its findings with respect to a single factor that the grant of a license would not be in the public interest, it is authorized to deny the application on that ground.

Whether such factors as the adequacy of program service require consideration by the Commission in reaching a determination whether an application for renewal should be granted or denied depends on the facts of the particular case and the judgment of the Commission with respect to those facts. A misstatement or a series of misstatements to the Commission may be so serious as to justify the Commission without more in denying renewal of license. If the Commission is doubtful as to whether the misrepresentations alone indicate a lack of essential qualification for a licensee then it is within the Commission's power to consider other factors. But the mediocrity, adequacy or excellence of a station's

program service cannot serve to make a trivial misstatement serious or a grave falsification a matter of no consequence.

Moreover, the specific value of a licensee's assets which would be adversely affected by a refusal to renew the license can have no bearing on a determination whether he has engaged in conduct warranting such refusal. Sections 301, 304, 307 (d) and 309 (b) of the Act define the limited interest created by a license and make it clear that a licensee can acquire no right to the use of a frequency paramount to the federal regulatory authority. Dishonesty cannot be mitigated by the fact that the guilty party's assets are large.

In holding that the Commission's decision was arbitrary and capricious for the reason that it constituted a departure from previous Commission decisions, the court below has misinterpreted the previous decisions of the Commission and has, moreover, improperly applied the doctrine of *stare decisis* to the Commission's determinations. The courts have consistently held that the doctrine of *stare decisis* is not applicable to administrative determinations.

ARGUMENT

This case involves no question concerning the sufficiency of the evidence to support the findings made by the Commission. The court below

found—and the respondent in its argument made no contention to the contrary—that the evidence supports the Commission's finding that the respondent made repeated concealments and misrepresentations to the Commission concerning a substantial minority interest in the respondent corporation (R. 62–63). This concealment was not the result of any inadvertance, nor was it an isolated incident; carried on for a period of approximately twelve years, it was plainly wilful. Indeed, in this very proceeding, the respondent's general manager testified falsely. See *supra*, pp. 15–16. On this ground, the Commission concluded that the respondent could not be entrusted with the responsibilities of a licensee and that a grant of a renewal of its license, therefore, would not serve the public interest.

The court below held that the Commission "acted arbitrarily in proceeding from its warranted conclusion that the stock ownership had been misrepresented to it, to the drastic decision that the continuance of the license would not be in the public interest." (R. 72). The court based this conclusion on the ground that the making of false statements or concealment of facts is not in itself an adequate ground for finding that an applicant cannot be entrusted with the responsibilities of a licensee but that the Commission is required to weigh other factors such as the quality of respondent's program service and the value of

the property involved (R. 71–72). This holding completely misconstrues the provisions of the Communications Act and results in a substitution of the judgment of the court below for that of the Commission on a matter entrusted to the Commission for determination.

I. The Communications Act authorizes the Commission to refuse to renew a license because of a licensee's repeated and wilful concealments from, and misrepresentations to, the Commission

Provision for renewal of licenses upon expiration of the license period is contained in Section 307 (d) of the Communications Act. Appendix, *infra*, pp. 54–55. That Section provides that "action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications." The nature of some of the considerations which Congress intended to be passed upon by the Commission is clearly indicated by the provisions of Section 308. Appendix, *infra*, pp. 55–56. Section 308 (a) requires that all applications for license or renewal shall be in writing, and Section 308 (b) provides that the application "shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, *character*, and financial, technical, and other qualifications of the

applicant to operate the station."[9] (Italics supplied.) This subsection contains the further provision that:

> The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

These provisions of Section 308, relating to the requirement of a written application and the authority conferred on the Commission to require additional statements of fact from licensees and applicants, are closely related to the provisions

[9] Sec. 3.24 of the Commission's regulations, 47 C. F. R. (Cum. Supp.) 3.24, reflect this provision by specifying that the character of the applicant is an element to be considered in determining whether a license should be granted. It states that:

"An authorization for a new standard broadcast station or increase in facilities of an existing station will be issued only after a satisfactory showing has been made in regard to the following, among others:

* * * * *

"(d) That the applicant is legally qualified. That the applicant (or the person or persons in control of an applicant corporation or other organization) is of good character and possesses other qualifications sufficient to provide a satisfactory public service."

* * * * *

of Section 312 (a) of the Act, Appendix, *infra*, pp. 57–58, which provides in part that:

> Any station license may be revoked for false statements either in the application or in the statement of fact which may be required by section 308 hereof, or because of conditions revealed by such statements of facts as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application * * *.

A review of the licensing provisions of the Communications Act thus reveals the close interrelationship of three provisions: The requirement of a written application for a license and a renewal of license (Sec. 308 (a)); the indication in Section 308 (b) that one of the purposes to be served by such an application is to enable the Commission to give consideration to the character of an applicant; and the authority granted to the Commission by Section 312 (a) to revoke any station license for false statements in the application or in other statements of fact required by the Commission pursuant to Section 308 (b). By these provisions, the Act gives express recognition to the importance to the Commission for the exercise of its licensing functions of a written application, the truthfulness of the applicant's responses, and the good character of the applicant. The Act also makes clear that the

importance of these elements is undiminished where application is made for the renewal of a license previously granted.

While it is true, as the court below stated (R. 71), that the denial of a renewal of a license because of the applicant's concealments and misrepresentations cannot be justified as a penalty for making false statements, since punitive sanctions for such violations of the Act and the Commission's rules and regulations are exclusively afforded, after trial and conviction, by Sections 501 and 502 of the Act, Appendix, *infra*, pp. 58–59, this fact does not detract from the power of the Commission in the conduct of its licensing functions. A refusal to renew a license because of misconduct related to the privilege conferred does not constitute a penalty in the same sense as the imposition of a fine or imprisonment. That very issue was considered in the case of *National Broadcasting Company* v. *United States*, 319 U. S. 190, 222–223, in which this court held that the fact that conduct of a licensee may be violative of and punishable under the provisions of the anti-trust laws, does not bar the Commission from considering such conduct in a licensing proceeding when it is relevant to a determination of whether the party engaging in such conduct would be a fit licensee. Cf. *Helvering* v. *Mitchell*, 303 U. S. 391, 399; *Steuart & Bro.* v. *Bowles*, 322 U. S. 398, 404–407.

Other administrative agencies have consistently held that the concealment and misstatement by an applicant or licensee of facts necessary to the licensing agency for the proper exercise of its licensing and regulatory functions are sufficient grounds for a denial of an application for a license.[10] The courts have reached the same result in passing upon administrative action in denying an application for a license,[11] or suspending or revoking an outstanding license.[12]

[10] Department of Agriculture: *In re Bessie Silverfarb*, 3 A. D. 880; Civil Aeronautics Board: *Hassan Ali Easmeil*, Docket No. SR–1056 (Mar. 27, 1945); Interstate Commerce Commission: *Burbridge Common Carrier Application*, 14 M. C. C. 412; *Federal Storage Warehouses, Inc.*, 43 M. C. C. 673; Office of Price Administration: *In the Matter of Tramor Cafeteria, Inc.*, 3 OPA Op. and Dec. 6215; *In the Matter of Maynard Wood*, 3 OPA Op. and Dec. 6220; *In the Matter of Mark C. Bloome*, 3 OPA Op. and Dec. 6208; Securities and Exchange Commission: *In the Matter of Securities Exchange Corporation*, 2 S. E. C. 760; *In the matter of Charles P. Rogers*, 3 S. E. C. 597; *L. P. Atwater*, 3 S. E. C. 763; *In the Matter of Mine Sales, Inc.*, 5 S. E. C. 574.

[11] *Doran* v. *Judd*, 31 F. 2d 108 (C. C. A. 3); *Bernstein* v. *Doran*, 33 F. 2d 897 (C. C. A. 3); *National Grain Yeast Corporation* v. *Mitchell*, 51 F. 2d 560 (C. C. A. 3); *Wynne* v. *Romonat*, 46 F. 2d 29 (C. C. A. 3); *Newark Bay Cereal Beverage Company* v. *Wynne*, 57 F. 2d 83 (C. C. A. 3); *Great Western Broadcasting Association, Inc.* v. *Federal Communications Commission*, 94 F. 2d 244 (App. D. C.); *Middlesboro Liquor and Wine Company* v. *Berkshire*, 133 F. 2d 39 (App. D. C.); *Thomas J. Molloy & Co.* v. *Berkshire*, 143 F. 2d 218 (C. C. A. 2); *Roumanian American Winery V. Morgenthau*, 152 F. 2d 452 (C. C. A. 2).

[12] *Higgins* v. *Mills*, 22 F. 2d 913 (C. C. A. 2); *Archer* v. *Securities & Exchange Commission*, 133 F. 2d 795 (C. C. A.

It is evident that the Commission can properly exercise its licensing and other functions only if it receives adequate and truthful information from applicants and licensees. There are approximately 1000 standard broadcast stations presently licensed by the Commission, and, in the near future, there will be hundreds of television stations and several thousands of frequency modulation stations. Licenses for all of these stations have been or will be authorized to a great extent upon the basis of a showing made in applications. Renewals are granted on the same basis. If a detailed investigation were required to determine the accuracy of the representations contained in each of the thousands of applications received annually, an intolerable burden would be imposed upon the Commission. Such a requirement would seriously impede, if not prevent its normal operations.[13] It is, therefore, necessary for the Commission to rely on the truth of the representations made to it. This factor, in itself, justifies an insistence by the Commission upon complete honesty by applicants, and demonstrates that a finding

8); *Talbert* v. *Sims*, 143 F. 2d 958 (C. C. A. 4); *Levers* v. *Anderson*, 153 F. 2d 1008 (C. C. A. 10).

[13] On the basis of information gathered for the forthcoming annual report of the Commission for the fiscal year ending June 30, 1946, it appears that during that year, 3,238 applications for broadcast facilities were processed. In addition, there were many thousands of applications for authorizations in the other radio services, such as aviation, maritime, police, fire, etc.

of untrustworthiness in the dealings of an applicant with the Commission is sufficient to justify the further finding that the applicant does not have the good character which is essential for a licensee if the radio system is to be operated in the public interest. In upholding the Commission's denial of an application for a license on the ground that the applicant had made a false disclosure and had also made false statements, the court below, in *Great Western Broadcasting Association, Inc.*, v. *Federal Communications Commission*, 94 F. 2d 244, 246, remarked that:

> Undoubtedly the act contemplates that the applicant for a license shall establish those qualifications for the license which would make its grant serve the public interest, and this necessarily presupposes a frank, candid, and honest disclosure of the facts as to its qualifications deemed by the commission essential to enable the commission to act within its powers.

In this case, however, the court below was of the opinion that the Commission was not warranted in resting upon respondent's concealments and misrepresentations as a ground for denying a renewal of license because, as stated in the opinion (R. 63), "The Commission did not find that this concealment of fact had influenced it in making any decision throughout the years involved, nor did it find that it would have acted in any manner differently from the way it did act

on the various applications for renewal of license, had it known that the Pickards were the beneficial owners of these shares of stock." Indeed, the court went on to say that the Commission could not have found that the Pickards were disqualified in any way to own shares in respondent because there is no evidence upon which such a finding could be based (R. 71).

To require the Commission to decide whether the information, if revealed, would have caused it to act differently than it did, would be to demand an inquiry into an issue which is of no relevance to the determination of the applicant's qualifications as a licensee. An applicant's character could hardly be deemed more acceptable simply because its misstatements, wilful and continued, might not have influenced the Commission in acting upon its earlier applications. What is decisive is that the misrepresentations, in and of themselves, so reflect upon the applicant's fitness to operate a station in the public interest as to warrant the Commission in refusing to renew its license. Moreover, application of the restrictive rule laid down by the court below would go far to destroy the effective authority of administrative agencies to require the furnishing of truthful information. No such requirement has been imposed in comparable situations. Thus it has been held that the failure to keep records or refusal to permit inspections is sufficient ground

for revocation of a license even though it is not shown that the failure or refusal was for the purpose of concealing an actual violation. *Burns* v. *Doran*, 37 F. 2d 484 (C. C. A. 3); *DeLuca* v. *Stone*, 45 F. 2d 846, 848 (D. Md.). Even in criminal prosecutions for wilful misstatements of facts to government agencies, no showing is necessary that the agency was, in fact, misled by the false information. *Kay* v. *United States*, 303 U. S. 1; cf. *United States* v. *Presser*, 99 F. 2d 819, 822 (C. C. A. 2). In the *Kay* case, this Court observed (303 U. S. at 5–6) that "It does not lie with one knowingly making false statements with intent to mislead the officials of the [Government] Corporation to say that the statements were not influential or the information not important."

It may readily be admitted that before the Commission can properly deny an application on the basis of misstatements, it must, of course, determine whether the misstatements are so serious and were made under such circumstances as to warrant a conclusion that the applicant cannot be entrusted with the responsibilities of a licensee. It might well be unreasonable for the Commission to reach such a conclusion on the basis of isolated and insignificant misstatements, or ones resulting from inadvertence or misunderstandings. But such a judgment must be made by the Commission in the light of the nature of

the misstatements, their seriousness, and the circumstances under which they were made.[14]

In its decision, the Commission pointed out the necessity of having full information about each of an applicant corporation's stockholders in order to enable it to give consideration to the character, background, and training of all parties having an interest in the proposed license, in the discharge of its statutory duty to pass upon the qualifications of applicants (R. 36). And it concluded that "The failure in this case to disclose that the Pickards were stockholders in WOKO, Inc., prevented a determination of their qualifications and fitness under the Communications Act." (R. 36). The Commission also found that the concealment was wilful (R. 36), and noted that general manager Smith had even testified falsely in the hearing in the instant case (R. 33, 37). In the light of the authorities discussed above, these findings provided an ample basis for the

[14] This is indeed the approach which the Commission has adopted, as is illustrated by its decision in *Buffalo Broadcasting Corporation*, 10 F. C. C. — (decided December 19, 1945), cited by respondents (Br. in Opp. 9, 14, 16). In that case, the Commission found that the failure of the licensee to make full disclosure in its reports to the Commission of certain agreements with a third party indicated a lack of candor and care in the preparation of the reports. The Commission concluded that these omissions were not so serious as to require a denial of the application for renewal, particularly in view of the fact that one of the basic agreements involved had been filed with the Commission's predecessor, the Federal Radio Commission.

Commission's conclusion that the application for renewal should be denied. It was plainly unnecessary for the Commission to make findings as to whether or not the Pickards were disqualified in any way to own the shares of stock involved. The observation of the court below that the Commission could not have found that the Pickards were disqualified therefore has no relevance to the disposition of the appeal. Moreover, had it been necessary to pass on this question in this proceeding or had the full facts been disclosed to it in previous applications, the Commission, with its expert knowledge of the field of radio and the significance of the relationships between stations and networks, could well have come to a conclusion contrary to that reached by the court.

The record discloses that Pickard, then vice-president of Columbia Broadcasting System in charge of station relations, received the stock interest in respondent as consideration for doing an act which he was under a duty to his employer to perform if it were in the best interests of the Columbia Broadcasting System. There was, therefore, ample basis for a conclusion that Pickard was not a person of good character, since he had betrayed his employer's trust in him in the acquisition of his stock interest in respondent. Of even greater significance, however, was the bearing of Pickard's conduct on the important subject of the relationships between network organiza-

tions and independent radio stations. That these relationships may have vital bearing on the public interest is amply shown in the *Network* cases, *Columbia Broadcasting System, Inc.,* v. *United States,* 316 U. S. 407, and *National Broadcasting Company* v. *United States,* 319 U. S. 190. The securing and awarding of network affiliation contracts by a species of commercial bribery is clearly not conducive to fair competition in the creation of network affiliations. Moreover, the securing by a network official of interests in local stations, by means of abuse of his power to award network affiliation contracts, creates the danger of an undue concentration of control of a most sinister kind.

The Commission did not make these findings; it could not have, prior to 1943, with the relevant facts concealed from it. And after discovering the long-standing imposition upon it by concealments and misstatements, it was unnecessary for the Commission to make findings as to what it might have done had it known the truth. As Chief Judge Groner observed in his dissenting opinion, "What, if anything, would have happened if the truth had been disclosed is, in my view, not material" (R. 72). It was sufficient for the Commission to find that wilful misstatements and concealments of fact had occurred, and that by its conduct over so long a period of time the respondent had demonstrated that it could not be trusted.

The court below suggests in its opinion (R. 63, 66) that the Commission's action was improper because there is no finding that Curtis and The Press Company had any knowledge of Smith's concealment of Pickard's interest. Indeed, the court went so far as to make a finding that they had no such knowledge, although it admits that both Curtis and The Press Company knew of the original issuance of 240 shares to Pickard. It is true that the Commission itself made no affirmative finding that Curtis and The Press Company knew of the acts of misrepresentation made on behalf of the respondent corporation by Smith, its general manager. It stated, however, that it "would be credulous indeed to accept without question representations that the directing officers of the applicant corporation did not know the identity of the real owner of the stock listed and reported as owned by R. K. Phelps over an eight year period from 1934 to 1942" (R. 37), and pointed to the existence of circumstances from which it could be concluded that Curtis and The Press Company did know of the deceptions. Thus, as to Curtis, it noted that he was the President and a director of respondent, had been long associated with Smith, and knew of the manner in which Pickard obtained his interest in WOKO (R. 37). Moreover, the capital structure of the corporation was so arranged that Curtis and Smith should have the controlling interest in respondent (R. 25–26).

There was thus no basis in the record upon which the Commission could "notice the innocence of Curtis" as the court did (R. 66).

So far as The Press Company is concerned, the circumstances that the respondent was a closely held corporation in which The Press Company held a twenty-five percent stock interest (R. 26); that The Press Company's managing editor was a member of WOKO's board of directors (R. 26); that it knew of the original issuance of stock to Pickard; and that Phelps never participated in the corporation's affairs (R. 37), were certainly enough to show that the court below had no basis for its own finding that The Press Company had no guilty knowledge.

A more fundamental consideration, however, is the recognition that there was no need for the Commission to find that Curtis and The Press Company had specific knowledge of the misstatements. The Commission here found that general manager Smith knew the falsity of the statements made to the Commission and had even testified untruthfully in the instant proceeding. Certainly, the acts of the respondent's responsible officer, authorized by the stockholders to act for it, were necessarily the acts of the respondent itself. There are numerous acts which the authorized representative is in a position to do

which may result in imposition of fines or penalties on the corporation or even forfeiture of the corporate charter, despite the innocence of the stockholders. Generally, the protection of the stockholders lies in choosing men of integrity to act for them, and in supervising their conduct so far as it is possible to do so. Should the value of their investment be lost by some unauthorized impropriety of their representative, they would have a remedy by way of an action for damages against him.

In the perspective of these considerations, it was reasonable for the Commission to conclude, from the undisputed findings of persistent misstatements and concealments in its dealing with the Commission, that respondent was unfit to be entrusted with the responsibilities of a licensee and that a grant of the application for renewal of license for the operation of WOKO by respondent would not serve the "public interest, convenience, or necessity," the basic standard Which the Commission must apply under the Act. Section 309 (a), Appendix, *infra*, p. 56. These are the very types of judgment which are entrusted to administrative discretion by a grant of licensing authority to be exercised in the light of the criterion of the public interest, convenience, or necessity. *Cf. Ma-King Co.* v. *Blair*, 271 U. S.

479, 482. For it is in the conclusions to be drawn from the facts no less than in the finding of the facts that the judgment and expert knowledge born of continuing contact with the particular subject matter ripen and come to fruition. On that ground, this Court has been reluctant to impose its own particularizations of broad statutory criteria for administrative action on the agencies, but has been content to hold that a "sensible exercise" of administrative judgment in applying statutory criteria of such breadth would be left undisturbed. *Gray* v. *Powell*, 314 U. S. 402, 413. See also *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125; *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U. S. 134, 145–146; *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111. See Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis* (1944), 58 Harv. L. Rev. 70, 102–103.

That such a latitude is properly to be accorded by reviewing courts to the Commission in the exercise of its licensing powers is manifest from the legislative history of Section 402 (e) of the Communications Act, providing for judicial review of licensing determinations of the Commission exclusively by the Court of Appeals for the District of Columbia. As originally enacted, Section 16 of the Radio Act of 1927, 44 Stat. 1169, provided in part that, on appeals from licensing decisions of the Federal Radio Commission, the

Court of Appeals for the District of Columbia was empowered to "alter or revise the decision appealed from and enter such judgment as to it may seem just." In *Federal Radio Commission* v. *General Electric Company*, 281 U. S. 464, 467, this Court held that this provision made the Court of Appeals "a superior and revising agency" in the administrative field and consequently that its decision was not a judicial judgment reviewable by this Court. In the light of this decision, Congress amended Section 16 of the Radio Act of 1927, by the Act of July 1, 1930, C. 788, 46 Stat. 844, to provide "That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary or capricious." As amended, Section 16 (d) was carried over without change into Section 402 (e) of the Communications Act. Appendix, *infra*, p. 58.

II. The court below erred in holding that the Commission was required to make findings concerning the respondent's program service, the value of its property, and other factors

The court below held (R. 66–68, 70) that, admitting the concealments and false statements made by respondent, the Commission could not deny a license on that ground without considering the quality of respondent's program service, the value of the radio property, and similar fac-

tors. This, however, confuses the nature of the inquiry which must be made as a basis for a grant of a license with the extent of the findings which will suffice as a basis for denial when inquiry has proceeded sufficiently to reveal the want of an essential qualification.

The Communications Act of 1934 does not prescribe specifically the findings which must be made by the Commission to support a conclusion that an application for renewal should be denied. It simply provides that the Commission shall not issue a license or renewal unless it is able to determine that the public interest, convenience, or necessity would be served thereby. The Act does not in any way provide that the Commission must make findings on all of the numerous factors which may be within the scope of the criterion of the public interest, when it is able to reach the conclusion on the basis of its findings on one or a limited number of factors that the grant of a license would not be in the public interest. The Commission, in order to reach a conclusion that an application should be granted, must be able to determine that the applicant is qualified in all respects and that there appears nothing adverse to applicant which would warrant a conclusion that a grant would not be in the public interest. When, however, the Commission is confronted with such an adverse factor, and is able to conclude that, because of it a grant would not

serve the public interest, it would be wasteful and fruitless to require the Commission to go on to catalogue all the respects in which the application was otherwise meritorious and not deficient. The Act itself imposes no such requirement nor can the requirement that the Commission's licensing powers be exercised in the light of the public interest, convenience or necessity be so construed.

This is made clear by the decisions of this Court in the *Network* cases, *Columbia Broadcasting System, Inc.*, v. *United States*, 316 U. S. 407, and *National Broadcasting Company* v. *United States*, 319 U. S. 190. These cases involved the validity of certain regulations of the Commission in which it announced that no license would be granted to any station holding a network affiliation contract containing specified features which the Commission found to be contrary to the public interest. This Court, in passing upon the reviewability of these regulations in the case of *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, 418, observed that "the regulations are rules which in proceedings before the Commission require it to reject and authorize it to cancel licenses on the grounds specified in the regulations without more." The validity of these regulations was upheld by this Court after review upon the merits in the subsequent case of *National Broadcasting Company* v. *United States*, 319 U. S. 190.

The court below has also held that where the Commission finds that one or two grounds provide a sufficient basis for the denial of a license, it need not consider other factors which might be pertinent had the grounds rested upon presented no insurmountable obstacle. *Simmons* v. *Federal Communications Commission,* 145 F. 2d 578 (App. D. C.). In the *Simmons* case, the court below held that the Commission properly rested a denial of an application on the grounds that the proposed antenna site was unsuitable and that the proposed station would cause objectionable interference with existing stations. The court held that the Commission was not required to make findings on other issues. See also *Greater Kampeska Radio Corporation* v. *Federal Communications Commission,* 108 F. 2d 5 (App. D. C.)

It is, of course, true that the adequacy of the program service rendered by the applicant for renewal of his license and other similar factors may be relevant to a determination of whether renewal of the license meets the standard of public interest, convenience and necessity. But whether such factors are relevant—in the sense that the Commission should consider them—depends on the facts of the particular case and on the judgment of the Commission with respect to those facts. A misstatement or series of misstatements to the Commission may be so serious

as to justify the Commission, without more, in denying renewal of the license. Unless the judgment of the Commission in this respect is arbitrary or capricious its decision must stand.

It may on occasion be appropriate for the Commission to consider other factors. If the Commission is doubtful as to whether the misrepresentations alone indicate a lack of essential qualifications for a licensee, then it is within the Commission's power to consider other factors. But, here again, it is the Commission's judgment as to whether the misrepresentations are in that doubtful class which must control. And, the mediocrity, adequacy, or excellence of the station's program service cannot serve to make a trivial misstatement serious, or a grave falsification a matter of no consequence. The record in this case shows plainly that the conclusions of the Commission as to the seriousness of the misrepresentations were wholly reasonable.

Moreover, the specific value of a licensee's assets can have no bearing on a determination whether he has engaged in conduct which would warrant the Commission in refusing him a renewal of license. Indeed, differences in treatment based on whether the station's assets are worth $3,000 or $300,000 would be repugnant to every consideration of fairness and equal treatment. In addition, in a case where the denial is otherwise proper and within the Commission's

authority, any approach which is based on the view that denial of a renewal of a license would destroy valuable property rights of the licensee is expressly barred by the provisions of Sections 301, 304, 307 (d), and 309 (b) of the Communications Act, Appendix, *infra*, pp. 53–55, 56–57, which define the limited interest created by a station license and make it clear that a licensee can acquire no right to the use of a frequency paramount to the regulatory power of the United States, which under the Communications Act has been delegated to the Commission by Congress. See *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 282; *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, 475, and *Ashbacker Radio Corporation* v. *Federal Communications Commission*, 326 U. S. 327.

As this Court pointed out in the *Nelson Brothers* case, *supra*, and in the *Pottsville* case, *supra*, those who make investments in radio broadcasting stations do so in the light of, and subject to, the Federal regulatory authority, and these investments cannot therefore operate to foreclose or curtail any proper exercise of that authority. The inevitable consequence of any Commission determination that the conduct of a licensee is in such substantial violation of the Act as to warrant a denial of a renewal of the license, is to impair the value of the licensee's assets so far as they are dependent upon the use of a

frequency. It would be manifestly absurd to say that this inevitable consequence of a denial is a factor which operates to curtail the Commission's authority to determine when a denial is appropriate. The value of the assets involved cannot therefore be a criterion for determining whether misstatements or other conduct in violation of the Act and the Commission's regulations are so serious as to warrant a denial.

The court below was of the opinion (R. 68–69) that the Commission's action in the instant case, in refusing respondent a renewal of its license because of its concealments and misrepresentations, was arbitrary and capricious for the reason that such action constituted a departure from the course which the Commission had taken in dealing with misstatements in applications in other cases in which other factors were taken into account. The court, however, has misinterpreted the Commission's decision. Those cases simply stand for the proposition that, in passing upon the seriousness of a licensee's conduct in making misstatements to it, the Commission will examine the particular situation and determine whether any mitigating or exonerating circumstances are present, and give due weight to these.[15] None of the Com-

[15] In *Navarro Broadcasting Association*, 8 F. C. C. 198, cited by the court below, a majority of the Commission found mitigating circumstances in the fact that the parties directly responsible for the concealment had wholly relinquished their interest in the station over two years prior to the issuance of

mission's decisions relied upon the court below can therefore be construed as in any way binding the Commission to consider the quality of program service rendered by a licensee or the value

---

the order of revocation, that the parties remaining as licensees of the station had acquiesced in the concealments at a time when they were new and inexperienced in the field of broadcasting, and that the subsequent conduct of the licensee demonstrated to the Commission that they could be entrusted with the responsibilities of a licensee. It is thus clear that, in the *Navarro* case, the Commission rested its decision on the ground that the licensees had so rehabilitated themselves as to give the Commission assurance that they could be trusted with the responsibilities of a licensee. The Commission did not decide that the license should not be revoked because that would deprive the community of service, or because the licensees had been rendering an adequate service, but rather because the licensee could now be trusted, and should therefore be permitted to continue to render the adequate radio service it had theretofore given the community. One Commissioner dissented. *Red Lands Broadcasting Association, et al.*, 8 F. C. C. 473, involved the same parties as in the *Navarro* case and the Commission reached the same result.

In the case of *Panama City Broadcasting Company*, 9 F. C. C. 208, also cited by the court, a bare majority of the Commission found mitigation in the fact that the acts of concealment had been committed by agents without specific direction from the respondent licensee. It also felt that special circumstances were presented by the fact that the community would be deprived during wartime of the service of the only existing station rendering primary service to the area. For, during the war period, the Commission did not grant construction permits for new stations in areas already receiving primary service from other stations. See 9 F. C. C. at 219, 353, 356. Three Commissioners dissented on the grounds that they could not find mitigating circumstances, and that they could not share the majority's concern that the community would be long without radio service in wartime if the order of revocation were made final.

of its investment before refusing to renew a license because of repeated concealments and misrepresentations.[16]

Moreover, even if it be assumed *arguendo* that the court below has not misinterpreted the Commission's earlier decisions, the holding that the Commission cannot depart therefrom, "except for most cogent reasons", results in subjecting the Commission's determinations to a most stringent

[16] The court below also deduced (R. 69–70), from reading the Commission's decisions referred to, that, under those decisions, the Commission was required to grant respondent's petition for rehearing. This petition (R. 54) proposed a reorganization of the licensee so as to enable it to "become qualified to hold a license and entitled to a renewal of the license heretofore granted to the corporation." It requested an opportunity to present evidence in support of its plan of reorganization and "such other and further relief in the premises as the Commission shall deem just and proper" (R. 57).

Section 405 of the Communications Act, governing petitions for rehearing, provides that the Commission may, in its discretion, grant a rehearing if sufficient reason therefor is made to appear. Respondent's petition for rehearing did not suggest any error in the Commission's findings of fact or conclusions, nor did it allege that respondent would adduce any new evidence to show that a grant of its application for renewal of license would serve the public interest, convenience, or necessity. Instead, it sought either to transfer control of respondent to various unidentified persons or to apply in their behalf for the facilities of WOKO. The Communications Act and the Commission's rules provide proper procedures to achieve both results. Certainly it cannot be contended that the Commission abused its discretion in denying a petition for rehearing which was not addressed to the matter under consideration but merely sought to raise questions which could be considered more appropriately in other proceedings.

and unusual doctrine of *stare decisis*, even though the court disclaims doing so (R. 68). Even courts are not so bound by the *stare decisis* doctrine as to make decisions departing from earlier rulings subject to castigation as arbitrary and capricious for that reason alone. Furthermore, the courts have consistently held that the doctrine of *stare decisis* is not applicable to administrative determinations. *Northern Pacific Railway Company* v. *United States*, 41 F. Supp. 439, 446 (D. Minn.), affirmed, 316 U. S. 346; *Virginian Railway Company* v. *United States*, 272 U. S. 658; *Western Paper Makers' Chemical Co.* v. *United States*, 271 U. S. 268; *Shawmut Ass'n* v. *Securities and Exchange Commission*, 146 F. 2d 791, 796 (C. C. A. 1); *Virginia Stage Lines* v. *United States*, 48 F. Supp. 79 (W. D. W. Va.). This Court stated in *Virginian Railway Company* v. *United States*, *supra*, that it has "no concern with the correctness of the [Interstate Commerce] Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it." (272 U. S. 658, 665–666). In *Western Paper Makers' Chemical Company* v. *United States*, 271 U. S. 268, 272, the objection was made that the Interstate Commerce Commission's reasoning and conclusions were inconsistent with conclusions reached by it in similar cases. This Court did not find oc-

casion to discuss this objection because the findings in the case before it were supported by substantial evidence.

There "is no doctrine which prevents * * * an equitable consideration of the special facts of each case * * * Flexibility was not the least of the objectives sought by Congress in selecting administrative rather than judicial determination." *Shawmut Ass'n* v. *Securities and Exchange Commission*, 146 F. 2d 791, 796 (C. C. A. 1). But if the doctrine of *stare decisis* were applicable, the very purpose of securing flexibility in administration would be defeated and the agencies would be prevented from moulding policy in the light of their continuing experience in their fields. Considerations thought to be applicable to a specific factual situation would assume the proportions of inexorable principles binding the agency even after it had learned by its experience that other considerations are of deeper and more permanent significance. Every false start would become a standard for future decisions and every determination on particular, limited facts would be erected into a principle of general applicability. This would be particularly unfortunate when, as in the cases relied upon by the court below, the principles thus established never had the unanimous concurrence of the Commission.

CONCLUSION

The Commission's conclusion, that the respondent was unfit to be entrusted with the responsibilities of a licensee and, consequently, that the public interest would not be served by a grant of its application, is supported by the undisputed findings and is within the scope of the authority conferred on the Commission by the Communications Act of 1934. In setting aside the Commission's order, the court below has exceeded the scope of its judicial competence and has invaded the sphere of administrative discretion, contrary to the repeated admonitions of this Court. The judgment of the court below should, therefore, be reversed.

Respectfully submitted.

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OCTOBER 1946.

APPENDIX

Communications Act of 1934, c. 652, 48 Stat. 1064, as amended May 20, 1937, c. 229, 50 Stat. 189, 47 U. S. C. 151, *et seq.*:

SEC. 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said

State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

* * * * *

SEC. 304. No station license shall be granted by the Commission until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

* * * * *

SEC. 307. (d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and

practice which affect the granting of original applications.

* * * * * *

SEC. 308. (a) The Commission may grant licenses, renewal of licenses, and modification of licenses only upon written application therefor received by it: *Provided, however,* That in cases of emergency found by the Commission, licenses, renewals of licenses, and modifications of licenses, for stations on vessels or aircraft of the United States, may be issued under such conditions as the Commission may impose, without such formal application. Such licenses, however, shall in no case be for a longer term than three months: *Provided further,* That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

(b) All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written

statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

* * * * * *

SEC. 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

(b) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

(1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein.

(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act.

(3) Every license issued under this Act shall be subject in terms to the right of use or control conferred by section 606 hereof.

* * * * * *

SEC. 310. (b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing.

* * * * * *

SEC. 312. (a) Any station license may be revoked for false statements either in the application or in the statement of fact which may be required by section 308 hereof, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, or for violation of or failure to observe any of the restrictions and conditions of this Act or of any regulation of the Commission authorized by this Act or by a treaty ratified by the United States: *Provided, however,* That no such order of revocation shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the licensee. Such licensee may make written application to the Commission at any time within said fifteen days for a hearing upon such order, and upon the filing of such

written application said order of revocation shall stand suspended until the conclusion of the hearing conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of revocation.

* * * * *

SEC. 402. (e) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 240 of the Judicial Code, as amended, by appellant, by the Commission, or by any interested party intervening in the appeal.

* * * * * * *

SEC. 501. Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this Act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this Act required to be done, or willfully and know-

ingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than $10,000 or by imprisonment for a term of not more than two years, or both.

SEC. 502. Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this Act, or any rule, regulation, restriction, or condition made or imposed by any international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 972 65

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*

v.

WOKO, INCORPORATED.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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Opinions Below.

The opinion of the United States Court of Appeals for the District of Columbia (R. 80-94) has not been reported.*

* The decision of the Federal Communications Commission (R. 30-51), reversed by the court below, has not been reported.

Jurisdiction.

The judgment of the Court of Appeals was entered on January 21, 1946 (R. 94). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended.

Statement.

Respondent does not dispute any of the findings of fact made by the Commission in its decision which is the subject of this litigation (R. 30-47). However, it is respondent's belief that the telescoped "Statement" in the Commission's petition overlooks many facts essential to a proper understanding of the background of this case. Accordingly, respondent adopts as its own for the purposes of this brief, the findings of fact (R. 30-47) made and entered by the Commission as a basis for denying respondent's application for renewal of license, and for an accurate summary of those findings respectfully refers this Court to the statement of the facts in this case found in the opinion of the Court below (R. 80-85).

From an order of the Commission denying respondent's application for renewal of license and a later petition for rehearing, respondent took an appeal to the United States Court of Appeals for the District of Columbia. On January 21, 1946, the Court of Appeals reversed the Commission's order. In its opinion, the Court said:

> "Simply stated, the question in this case is whether it is logical and rational to say that a licensee cannot be entrusted with further responsibilities for the sole reason that, over a term of years, one of its officers has concealed from the Commission the identity of a beneficial owner of twenty-four percent of its capital stock" (R. 92).

In approaching its decision of this question, the Court pointed out:

" . . . the Commission's decision must depend for validity on the rationality of the step, directly and without any other consideration, from the Commission's well grounded finding that the real beneficial owner of twenty-four percent of the stock had been concealed from it; to the conclusion that the appellant (respondent herein) 'cannot be entrusted with the responsibilities of a licensee', and the consequent additional conclusion that the renewal license would not serve the public interest, convenience, or necessity." (R. 92).

The answer which the court below gave to the question involved in the case is found in the concluding paragraphs of the Court's opinion:

"We are unable to agree that the step can logically be taken. Other elements must necessarily be weighed. Certainly the conclusion cannot be upheld as a penalty, for the reason stated heretofore; but the conclusion that the denial of the renewal license was penal in nature and so intended by the Commission cannot be escaped, for the appellant is the same corporation now which for fifteen years consistently has furnished adequate and satisfactory broadcasting service to its public, and has in all respects met the requirements of law and regulation except in the concealment of stock ownership upon which the Commission based its action. The Commission was quite justified in feeling vexed at the deception, and perhaps would have been justified in seeking criminal prosecution of Smith or of the appellant itself; but to say that this concealment, which did not induce or influence its former grants of renewal licenses, alone supports a conclusion that public interest, convenience, or necessity would not be served by the renewal, is in logic a non sequitur. The high mechanical, scientific and artistic standards maintained by the station, and the highly penal result of the deprivation of a license for a continuance of operation, are necessary considerations in the formation of a judgment as to public interest, convenience, or necessity.

"Under the situation disclosed here, we conclude that the Commission acted arbitrarily in proceeding from

its warranted conclusion that the stock ownership had been misrepresented to it, to the drastic decision that the continuance of the license would not be in the public interest, with the concomitant results of disestablishing an established and satisfactory radio station and of imposing upon its corporate owner the entire loss of its good will and the serious impairment of the value of its capital assets." (R. 92-93.).

Question Presented.

The simple question thus presented by the Commission's Petition for Writ of Certiorari as shown by the decision of the court below is whether the Commission's finding that respondent was chargeable with a misrepresentation as to the beneficial ownership of a minority interest in its stock, standing alone, supported the Commission's conclusion that respondent lacked the character essential to continue to be a licensee of a radio broadcasting station.

The Commission's position is that such a finding automatically required the conclusion that respondent lacked the character essential to continue to be a licensee. The Court held that the jump from the bare finding of misrepresentation to the ultimate conclusion of lack of character was, in the circumstances of this case, so unreasonable as to constitute arbitrary action and not the exercise of a sound administrative judgment.

Commission's Specification of Alleged Errors.

The Commission's allegations as to errors committed by the court below stem from an erroneous interpretation of the opinion and judgment of that court. We will briefly deal with each of the alleged errors.

1. The court below did not hold that the Commission lacks authority under the Communications Act of 1934[1] to deny an application for a renewal of license on the ground that an applicant had deliberately made false state-

[1] 48 Stat. 1064, 50 Stat. 189, 47 U. S. C. § 151, *et seq.*

ments which demonstrated his lack of qualifications to be a licensee of a broadcasting station. It would appear from the Commission's first specification of error that the court below held that a finding that deliberate misrepresentations had been made by a licensee was immaterial to the consideration of the licensee's qualifications for renewal of license, and that all such misrepresentations must be condoned by the Commission. The Commission concedes that the crucial issue before it on respondent's renewal application was the character of respondent to continue as a licensee of a broadcasting station. What the court held was that, in order to conclude that a licensee who had made misrepresentations to the Commission is for that reason lacking the requisite character to be a licensee, there must be some logical nexus between the misrepresentations made to the Commission and the conclusion that the licensee lacks the character essential to continue to operate a broadcasting station. The materiality of the facts concealed or misrepresented, the motive and purpose in making the concealment or misrepresentation, the extent of reliance by the Commission upon the misrepresentation, the type of service, both technical and program, likely to be rendered by a person found to have made the particular misrepresentation, and the inferences to be drawn as to the character of the applicant from his past record of performance as a licensee of a broadcasting station, these and other similar considerations were held by the Court to require the attention of the Commission in determining what conclusions should be drawn from the fact that a licensee has been found to have made a misrepresentation to the Commission. It is not a fair interpretation of the decision of the court below to contend that it holds that the Commission does not have authority under the Communications Act of 1934 to deny an application where the false statements made to the Commission can reasonably and logically be held in and of themselves to demonstrate lack of character of the applicant to operate a radio broadcasting station.

2. The second specification of error in the Commission's petition stems from an erroneous conception of the proper function of the court below in reviewing appeals taken under Section 402(b) of the Communications Act. There is no question but that the court below in reversing the Commission necessarily exercised its own judgment and discretion on the questions of law involved in the appeal. *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80, 94. How else could the court have exercised its judicial power under Section 402(e) of the Communications Act of 1934? The court below did not substitute any of its own findings of fact for those made by the Commission, but held that the Commission's own findings did not support the Commission's conclusion. In deciding whether the findings of fact made and entered by the Commission supported the conclusion that respondent was not qualified to continue to be a licensee of a radio broadcasting station, the court below was performing a proper judicial function and was not usurping any administrative function exclusively vested in the Commission. It is well settled that the determination by the court below under Section 402(e) of the sufficiency of Commission findings to support its conclusions involves the exercise of a judicial function. *Federal Radio Comm.* v. *Nelson Bros. Bond & Mtge. Co.*, 289 U. S. 266; *Saginaw Broadcasting Co.* v. *F. C. C.*, 68 App. D. C. 282, 96 F (2d) 554. Cert. denied 305 U. S. 613.

3. The Commission's third alleged error that the court rested its decision upon its own findings on issues on which the Commission made no findings and found it unnecessary to make any, again proceeds from an erroneous interpretation of the court's decision.* It is quite clear from the court's opinion that its judgment was rested upon the insufficiency of the Commission's findings to support the Commission's conclusion. The portions of the court's de-

* The Commission ignored these issues; it did not, as implied in the third specification, find it "unnecessary" to make findings on the point.

cision which deal with matters on which the Commission made no findings merely emphasizes the failure of the Commission itself to consider factors which were relevant to its conclusion in this case. The failure by the Commission to make any findings on issues which were essential to support its conclusion in this case, coupled with an administrative record which would only support findings favorable to respondent on such issues, accentuates the arbitrary character of the conclusion reached by the Commission and fully justified the court below in reversing the Commission.

4. With respect to the contention that the court below made certain findings, which the Commission was unable to make on the administrative record, with reference to the innocence of Curtis and The Press Company (two of the four stockholders of respondent corporation holding between them 50½% of respondent's stock) concerning Smith's concealment of Pickard's stock ownership, it is sufficient to quote from the opinion of the court below:

> "*There is no finding that Curtis,* who owned twenty-five and one-half percent of the appellant's capital stock, and The Press Company, which owned twenty-five percent of the appellant's capital stock, had any part in, or knowledge of, Smith's concealment of the Pickard interest. *It does appear that Curtis and The Press Company* knew of the original issue of two hundred forty shares to Pickard or his nominee, but *there is no suggestion that either participated in or knew of Smith's deception.*" (Italics supplied) (R. 84).

Again, the court below did not substitute its findings for those of the Commission. The court was merely adverting to the absence of findings by the Commission on the issue of *scienter* and, indeed, in its petition for writ of certiorari the Commission does not even suggest that the administrative record would support a finding of guilty knowledge on the part of Curtis or The Press Company of the misrepresentations made to the Commission.

5. The court did not hold, as the Commission implies, that the value of property used in a station's operation must be

taken into consideration in determining the qualifications of a licensee to obtain a renewal of license. What the court said on this point is as follows:

> "Moreover, common justice to the owner of the station, who has devoted a considerable investment to serving the public, requires that for no reason less than a 'compelling' one should his physical property be rendered valueless except for what it may bring at a sacrificial sale. It is true, as the appellee points out, that by the terms of the Communications Act, a station license does not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof, nor in any other manner than authorized therein. In spite of the absence of a vested property right in the continuance of the license, however, the Commission may not destroy or diminish the capital investment of the licensee by withholding a renewal of the license, unless in the exercise of a sound discretion it decides that the public interest, convenience, or necessity requires that such a drastic step be taken. The case of *Journal* v. *Federal Radio Commission*, 60 App. D. C. 92, was one in which a radio station had been effected injuriously by the assignment of its frequencies to another station. In the course of the opinion Judge Robb, speaking for this court, said:
>
> > 'The installation and maintenance of broadcasting stations involve a very considerable expense. Where a broadcasting station has been constructed and maintained in good faith, it is in the interest of the public and common justice to the owner of the station that its status should not be injuriously affected, except for compelling reasons.'
>
> If a station should not be injuriously affected save for compelling reasons, certainly it should not be destroyed by a refusal to renew its license for reasons that are less than compelling." (R. 91).*

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*To the same effect is the following language of the Commission in a decision rendered by it only a few weeks before the decision of the court below:

> "The failure of the Buffalo Broadcasting Corporation to make full disclosure in its report to the Commission of its

6. In alleging as error the holding by the court below that the Commission is precluded from denying a renewal of license because of false statements made by the applicant, since Sections 501 and 502 of the Communications Act provide penalties, the Commission again imports to the decision of the court below an interpretation which a fair reading of the decision does not justify. The court adverted to the provisions of Sections 501 and 502 of the Act as providing a procedure for invoking punitive measures against persons making false statements in applications or reports to the Commission, but nowhere in its opinion did the court intimate that the Commission was precluded from considering conduct punishable by fine or imprisonment as having a bearing upon the qualifications of respondent to continue as a licensee of a radio broadcasting station.

Reasons for Denying Writ.

1. The decision of the court below does not impose a limitation on the Commission's licensing authority. The decision recognizes the Commission's power and duty to determine the qualifications of all applicants for licenses or renewal of licenses including the character of an applicant to become or continue to remain a licensee. In the instant case

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agreements with the Churchill Tabernacle indicates a lack of candor and care in the preparation of the reports. While this has a direct bearing in the applicant's qualifications, we do not conclude that in this case the omissions were so serious—particularly in view of the fact that one of the basic agreements was before the Federal Radio Commission—as to require the applicant to be deprived of the value of the stations which it has successfully operated for more than fifteen years. Nor, do we conclude that for this reason the applicant should be found disqualified to ever again operate a radio station." *In re Application of Buffalo Broadcasting Corporation*, 10 F. C. C. —, December 19, 1945.

In this case the Commission found that the licensee had divested itself of control over the programs of its station (a violation of law), and had made misrepresentations concerning that fact to the Commission.

the Commission concluded that respondent lacked the character essential to continue as a licensee of a radio broadcasting station. In holding that this conclusion as to respondent could not logically or reasonably be drawn from the facts found by the Commission and set forth as the basis for its conclusion, the court below did not in any way curtail or hamper the Commission in the lawful exercise of any of its statutory functions. In reversing the Commission, the court did not deny the existence of the Commission's authority as a licensing body to determine the character of respondent to continue as a licensee; on the contrary, the court's decision recognizes this authority in the Commission and simply holds that it must be lawfully and properly exercised.

The court below did not hold, as the Commission asserts, (Br. 9-10) that a properly grounded conclusion of lack of character in respondent would have to outweigh any other competing considerations, before the Commission could properly refuse to renew respondent's license. It is plain from the decision of the court below that if the Commission's findings had rationally supported its conclusion that respondent lacked character to be a licensee, the Commission's decision would have been affirmed. The court held that, in this particular case, other considerations besides the misrepresentation with which respondent had been charged should have been considered as bearing upon respondent's character to be a licensee. This is not the same as holding that in determining the ultimate question of respondent's qualifications it was necessary for the Commission to go beyond a proper conclusion as to the lack of any requisite qualification. There is no question but that if the Commission had properly concluded that respondent was lacking in one requisite qualification, whether that was a legal, financial or technical qualification, or absence of character to be a licensee, it would have been unnecessary for the Commission to balance the lack of one qualification against other qualifications that respondent might have possessed

in order to determine whether its license should be renewed. The court's reference to respondent's past record as a licensee was made as indicating that this had some bearing on the issue of respondent's character to continue to be a licensee. Findings as to respondent's past program and technical service conceivably might have lent support to the Commission's conclusion that respondent could no longer be entrusted with the responsibilities of a licensee. Conceivably they might have supported a contrary conclusion. In any event, respondent's record of performance as a licensee over a period of some fifteen years was considered by the court below as having some bearing on the question of respondent's character to continue to remain a licensee, and in failing to advert to respondent's past performance as a licensee, the Commission necessarily omitted one relevant factor in reaching its conclusion. Since the question before the Commission in the instant proceeding was the character of respondent to carry out the duties and responsibilities of a licensee, certainly the past record of the respondent in carrying out such duties and responsibilities had some relevance to the conclusion as to whether respondent did or did not possess the requisite character.

2. The argument which the Commission makes that the decision of the court below imposes a heavy administrative burden upon the Commission to investigate the accuracy of representations contained in each of the thousands of applications received annually would have merit only if the Communications Act of 1934 contained an absolute bar upon the granting of licenses or renewal of licenses to persons who make false statements to the Commission. The assertion that an intolerable burden is imposed upon the Commission as a result of the decision of the court below which will seriously impede, if not prevent, the normal operation of the Commission cannot be taken seriously in view of the Commission's assertion that the determination of the effect of a finding of misrepresentation must be made by the exercise of a sound discretion by the Commission. If the Com-

mission must exercise a sound discretion in each case where it discovers that a misrepresentation has been made to it, then it cannot apply any such "rule of thumb" method as it applied in the instant case. It would have to determine in the case of each misrepresentation the motive, purpose and surrounding circumstances, and the bearing which the misrepresentation has on the character of the applicant to be a licensee. In order for the Commission's administrative burden in this respect to be diminished, it would be necessary for the Commission to disqualify any person which it found to have made a misrepresentation irrespective of the circumstances or extenuating factors that might be present. To take such a position is to argue for an interpretation of the statute which places a far greater limitation on the Commission's licensing authority than does the decision of the court below.

The court held that the Commission has discretion (in fact the responsibility) to determine in every case what inferences should be drawn from the misrepresentations in deciding the character of the applicant as a prospective licensee. During the entire history of the Commission and its predecessor, the Federal Radio Commission, the interpretation of the Commission's powers with respect to the renewal of licenses of stations to persons who have made misrepresentations to the Commission has been uniformly the interpretation which the court below gave in the instant case.* In the Commission's petition for writ of certiorari we are confronted with the incongruous spectacle of a licensing agency suggesting an interpretation of the statute under which it operates, which places the agency in a straight jacket and deprives it of any authority

*Panama City Broadcasting Co. (WDLP), 9 F. C. C. 208 (1942); Ocala Broadcasting Co. (WTMC), 9 F. C. C. 223 (1942); Red Lands Broadcasting Ass'n. et al., 8 F. C. C. 473 (1941); East Texas Broadcasting Co. (KGKB), 8 F. C. C. 479 (1941); Lee E. Mudgett (KRKO), 8 F. C. C. 226 (1940); Cannon System, Ltd. (KIEV), 8 F. C. C. 207 (1940); Navarro Broadcasting Ass'n. (KAND), 8 F. C. C. 198 (1940); Georgia School of Technology (WGST), 10 F. C. C. ——, March 23, 1943.

to exercise discretion in determining the seriousness of a misrepresentation, its bearing upon the ability of a licensee to render a public service, or its relationship to the character of a person to become or to continue to be a licensee. The Commission has always in the past asserted the power to weigh the misrepresentation against other relevant factors in determining whether or not a license should be granted or renewed. Some of the decisions in which the Commission has exercised its discretion as a licensing body and has renewed licenses despite the finding of prior misrepresentations to the Commission are cited in the decision of the court below. Respondent is not contending that the Commission is bound by these decisions on the doctrine of *stare decisis*, but rather that the uniform interpretation heretofore given the statute by the Commission over many years and accepted and followed by the court below is a proper interpretation of the Communications Act of 1934, and that any interpretation of the Act which would lighten the Commission's administrative burden by requiring a denial of license to a person found to have made misrepresentations to the Commission is not only in conflict with the Commission's own interpretation of the statute, but one which cannot be supported by logic nor necessity.

3. The Commission also urges as a reason for granting the writ that the court overstepped the boundary between judicial and administrative functions and substituted its own judgment for that of the Commission on a matter entrusted to the discretion of the Commission by the Communications Act. This argument is valid only on the assumption that the court below has not power to review the Commission's actions on matters of law. The court below held that the conclusion that respondent lacked the necessary character to be a radio station licensee did not follow automatically from the finding that respondent had made a misrepresentation to the Commission. The sufficiency of the Commission's findings to support its conclusion is a matter within the proper judicial power of the court below

to determine under Section 402(e) of the Act. *Federal Radio Commission* v. *Nelson Bros. Bond and Mtge. Co., supra; National Labor Relations Board* v. *Columbian E. & S. Co.*, 306 U. S. 292, 301.

4. As pointed out above, the court did not hold that the value of the property which would be deteriorated in value by a refusal to renew the license was a factor which the Commission had to consider as bearing upon the qualifications of the licensee. The court did point out that the large investment which the station licensee has in physical property is a reason why the Commission should not arbitrarily take action which would result in the utter destruction or severe deterioration of substantial property values. No suggestion was made by the court below that respondent had any property right in its license. See the language of the Commission in ~~his~~ *Buffalo Broadcasting Corp. Case*, see p. 8, footnote, *supra*.

5. The remaining reasons alleged by the Commission for granting the writ are equally without merit. There is no contention in this case that the refusal to grant a license is penal in nature *because* it necessarily results in damage to the applicant. The Commission itself disclaims any right to exercise its licensing power to punish a licensee for any past wrong doing. In substance and effect, however, action by the Commission which denies renewal of license on the grounds of a past wrongdoing, without tying in such wrongdoing with the inability of the licensee to continue to operate a radio broadcasting station, constitutes punishment rather than the exercise of a licensing power.

There need be no fear that the decision of the court below will have any adverse effect upon the licensing powers of federal agencies in general. Other agencies, we are sure, are aware that their conclusions of law must be supported by adequate findings of fact, and that is all the decision of the court below holds. With respect to the importance of being able to rely upon the correctness and

completeness of the information furnished by applicants and licensees, other agencies, like the Communications Commission, have for many decades faced this problem. It is true that the Commission has the burden of acting upon thousands of applications of licenses and renewal of licenses, and it is also true that the Commission must of necessity rely upon statements made in these applications in acting upon them. Similarly, other agencies of the Federal government must rely upon the truthfulness of statements made in applications and reports filed with them. Congress has provided severe penalties to deter persons from making false statements in such applications. Congress has not made misrepresentations an absolute bar to the granting of licenses or the renewal of licenses by the Communications Commission nor, for that matter, of licenses issued by any other Federal agency. Indeed, any such standard would constitute an unrealistic and unwise innovation.

If there is an inevitable connection between making false statements to the Commission and a disability to operate a radio station in the public interest, it lies with Congress to so specify, it certainly is not within the province of the Commission to add new qualifications to those laid down by Congress or to ask this Court to do so. The court below pointed out that drastic sanctions have been applied by Congress to the making of such false representations to the Commission. It hardly seems appropriate for the Commission to complain about a decision of the court below which adopts an interpretation of the statute which the Commission itself has uniformly held for years—nor can it either consistently or logically argue that the decision now interferes with the proper exercise by the Commission of its licensing functions.

The decision below involves no usurpation by the court of the Commission's functions. It does not circumscribe the Commission's discretion in acting upon applications for renewal of license; on the contrary it upholds the Commis-

sion's power to exercise a sound administrative discretion in acting upon such applications. The decision below does not announce a new or novel interpretation of the Communications Act. The decision gives the statute a sound and sensible interpretation consistent with the Commission's own interpretation of the statute not only prior to its action on respondent's renewal application, but in cases decided by the Commission subsequent thereto. *Georgia School of Technology (WGST)*, 10 F.C.C.—March 23, 1943; *In re Application of Buffalo Broadcasting Corporation (WKBW and WGR)*, 10 F. C. C.—December 19, 1945. The court's decision does not preclude the Commission from exercising a sound administrative discretion in determining the character of an applicant for license or renewal of license of a broadcasting station. It lays down no new or novel standard for determining whether a conclusion of law reached by the Commission is arbitrary. The decision of the court makes it clear that this case involves only the simple question of whether an ultimate conclusion reached by an administrative agency must be adequately supported by its basic findings of fact. In deciding that the Commission's conclusion in the instant case was not so supported and, therefore, was arbitrary and capricious, the court below did not render a decision of such importance or far-reaching effect as to require or justify the issuance of a writ of certiorari.

Conclusion.

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 65

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*,

v.

WOKO, INCORPORATED.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the District of Columbia (R. 59-73) is reported in 153 F. 2d 623.*

* The decision of the Federal Communications Commission (R. 23-38, 58), reversed by the court below, has not been reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 21, 1946 (R. 73). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended.

QUESTIONS PRESENTED.

The only questions presented—notwithstanding the Government's contrary contention—are:

(1) Was the court below correct in holding:

> "Simply stated, the question in this case is whether it is logical and rational to say that a licensee cannot be entrusted with further responsibilities for the sole reason that, over a term of years, one of its officers has concealed from the Commission the identity of a beneficial owner of twenty-four percent of its capital stock" (R. 71);

and,

(2) Did the court below commit reversible error in answering (1) *supra* in the negative.

STATEMENT.

Respondent does not dispute any of the findings of fact made by the Commission in its decision which is the subject of this litigation (R. 23-35). However, respondent disputes vigorously that the 16 page "Statement" (Gov. Br. 3-19) filed by petitioner contains an accurate restatement of the Commission's 12 page findings of fact. Accordingly, respondent adopts as its own for the purposes of this brief, the findings of fact (R. 23-35) made and entered by the Commission as a basis for denying respondent's application for renewal of license, and for a summary of those findings, the accuracy of which is not disputed by the Government, respectfully refers this Court to the statement of the facts in this case found in the opinion of the court below (R. 59-64).

SUMMARY OF ARGUMENT.

I. The court below properly held that the Commission's decision on respondent's renewal application was an unlawful imposition of a penalty and not a valid exercise of the Commission's licensing power. The correctness of the Court's decision is shown (a) by the procedure on respondent's renewal application which followed the lines of a criminal prosecution, and the Commission's summary dismissal of respondent's proffer of a corporate reorganization which would insure non-recurrence of the condemned misconduct, in striking contrast to Commission action in similar cases decided before and after this one; (b) by the Commission's decision which ignored elements relating to the qualifications of the respondent to operate and program Station WOKO on the theory that these elements bore on mitigation of punishment rather than on the basic question of respondent's qualifications, and the assertion of the power to punish as a means of lightening the Commission's administrative burden; (c) by the arguments advanced by the Government in defense of the Commission's action, justifying it as a means of discouraging others from making false statements to the Commission, thereby ignoring the statutory scheme prescribed by Congress for the imposition of sanctions upon one making a false statement to a Government agency.

II. The court below properly rejected the Government's argument that the Commission's administrative burden justified a refusal to pass on the merits of respondent's renewal application, since the Commission cannot avoid its duty to determine an applicant's qualifications to operate a station, irrespective of any past misconduct of the applicant. The Commission has so construed its statutory duty in *In the Matter of John H. Stenger, Jr.*, F. C. C. Docket 6[illegible] (May 29, 1946). The ownership by Pickard of a beneficial interest in 24% of respondent's stock was not material to a determination of respondent's qualifications to be a licensee. The arithmetic of respondent's stock distribu-

tion, which, as the Commission formally finds in its decision, was not fortuitous, but was designed to prevent Pickard from exercising any control of respondent corporation, precludes any argument that the concealment of his interest prevented the Commission from passing upon respondent's qualifications. Had the Commission been supplied with the facts as to Pickard's interest in respondent, it would thereby have had no basis for making any adverse finding on respondent's qualifications. It is indisputable that the non-disclosure of the Pickard interest was not made for the purpose, nor did it have the effect, of inducing or deterring any Commission action with respect to respondent's operations as a licensee or on any application filed by respondent. The court below, therefore properly stated that the only question involved in this case is "whether it is logical and rational to say that a licensee cannot be entrusted with future responsibilities for the sole reason that, over a period of years, one of its officers has concealed from the Commission the identity of a beneficial owner of 24% of its capital stock."

III. The court below properly held that the jump from the Commission's finding of concealment of the Pickard interest to the conclusion of lack of trustworthiness was not logical and rational. In so doing the court below did not usurp the Commission's administrative functions; it did not make findings of its own, but held only that the Commission's conclusion was a *non sequitur* from the facts which the Commission had found, and that it could not find any support for the Commission's conclusion from any other facts established in the administrative record. The Government's suggestion in this Court of a rational basis for the Commission's conclusion is an attempt by the Solicitor General to determine public policy in a field which, he insists, is committed exclusively to the Commission. Not only did the Commission not adopt the policy arguments now suggested by the Government concerning the evil of network officials having a stock interest in independent radio broadcasting stations, but the Commission by formal proclama-

tion has explicitly stated that it has not adopted a policy against such ownership and its decisions evidence a contrary policy. The non-disclosure of Pickard's beneficial interest obviously did not impair the ability of respondent in the past to discharge its responsibilities as a licensee to operate in the public interest, convenience and necessity. Nothing in logic, precedent or Commission experience justifies the conclusion that after or because of the disclosure of the Pickard interest, respondent will not continue to file truthful, accurate and complete reports on all material matters to the Commission or will not continue to operate Station WOKO in the same manner as it has in the past, admittedly in the interest of the public. The licensing experience of the Commission has demonstrated that licensees who have made misrepresentations (and licensees who have failed to disclose material matters and have made fraudulent misrepresentation in an effort to conceal material matters) have nevertheless been found qualified to operate radio stations in the public interest. The conclusion of the Commission that non-disclosure or misrepresentation in those cases would not impair the ability of such licensees to operate in the public interest has been justified by the operation of all the stations which have been permitted to continue operation, notwithstanding the making of material and even fraudulent misrepresentations. This experience offers no support to a conclusion in the instant case, where no fraud was involved, and where the non-disclosure was wholly immaterial, that respondent cannot be entrusted in the future as it has been in the past to operate its station in a manner consistent with highest standards of public interest. The court below found the Commission's contrary conclusion a *non sequitur* from the finding that Pickard's interest in respondent had been concealed and in so holding did not commit reversible error.

The use in the Government's brief of the word "character", not found in the Commission's decision, injects a false issue in the case. If "character" does not mean the

same thing as trustworthiness to perform the responsibilities of a licensee then the Government is injecting into the case a basis for the Commission's action which was not given by the Commission. If "character" means the same thing as trustworthiness to program and operate a broadcast station, the use of this synonym does not change the basic issue in this case, to wit, whether the finding that respondent made a false statement to the Commission justified the conclusion that it cannot be entrusted with the responsibilities of a licensee.

ARGUMENT.

I.

The Commission's Refusal to Renew the WOKO License Was Properly Set Aside on the Ground that it Constituted an Unlawful Imposition of a Penalty Upon Respondent.

A. The court below correctly held that the Commission may not lawfully refuse renewal of license in order to impose a penalty.

In its opinion the court below (R. 71) stated:

> "The denial of the renewal because of the applicant's failure to show the beneficial ownership of twenty-four per cent of its capital cannot be justified as a penalty for making false statements. The Act does not confer upon the Commission any punitive jurisdiction, and a license or its renewal may not be withheld in order to punish an applicant for violating the Act or a rule or regulation of the Commission. Such violations are to be punished only by the imposition after conviction, of the heavy fines imposed by Sections 501 and 502 of the Act. Nor does the Commission claim the right to punish, but on the contrary disavows any punitive intent here."

In its brief in this Court the Commission does not explicitly disavow punitive intent. It seeks, however, to avoid the holding that it refused to renew respondent's license as

a means of punishing Pickard and Smith by conceding a lack of statutory power to impose penal sanctions. (Gov. Br. 28.) This, coupled with the demonstration under Section B, *infra*, that the court below was justified in its holding that ". . . the denial of the renewal license was penal in nature and so intended by the Commission . . . ", is tantamount to a confession of error by the Commission.

B. The court below correctly found that the Commission's action was a penalty and was so intended.

The court below held (R. 71-72):

> ". . . the conclusion that the denial of the renewal license was penal in nature and so intended by the Commission cannot be escaped, . . ."

That the Commission's action was in essence penal is demonstrated both by the procedure followed by the Commission on respondent's renewal application and by the Commission's decision, and is effectively conceded by the necessary implication of the Government's argument in defense of such action.

1) *The procedure followed by the Commission reveals the penal character of the proceeding.*

It is clear from the record that throughout the entire administrative proceeding the Commission conceived the basic issue to be whether or not respondent was guilty of the charge of violating a Commission requirement concerning disclosure of the identity of its stockholders. The objection by Commission counsel to the introduction at the hearing of evidence relating to twelve year record of operation of Station WOKO and the failure of the Commission in its decision to advert to this important consideration is evidence of this fact.* A reading of the administrative record shows

* The examiner at the hearing overruled the objection of Commission Counsel and admitted such evidence. The Commission, however, quite apparently considered the objection of its counsel on the ground that such evidence was irrelevant well taken, for in its opinion it completely ignores the existence of the record evidence on this point.

that, except for the fact that respondent was charged with the burden of proving itself innocent, the whole conduct of the Commission proceeding was that of a prosecution.

The attitude of Commission Counsel was that of a prosecutor throughout. Contrary to the usual procedure in vogue at the Commission on hearings for renewal of licenses, witnesses were excluded from the hearing room so as to prevent any witness hearing the testimony of any other witness on the question of Pickard's stock interest. Every discrepancy, however minute, on testimony of matters taking place ten years or more before was seized upon and emphasized in the examination. Imbued with the sole idea of proving the respondent's admitted misrepresentation of a minority stock interest and of punishing them for it, the Commission steadfastly refused to take into consideration anything that would tend to substantiate respondent's proven trustworthiness and reliability to discharge the major responsibilities of a broadcast station licensee. Indeed at the oral argument, after the Commission's proposed decision had been handed down, an offer was made by the respondent to buy out Pickard's stock interest to thus rid itself of the focal point of Commission attack. (Tr. 1713, 1714) Questions asked by the Commissioners there indicated that they were not concerned with the qualifications of the licensee to operate in the future after the severance of the Pickard interests, but the only question of apparent concern was whether or not the plan would result in any monetary reward to Pickard. (Tr. 1715, 1716) Since the plan was to buy out Pickard's interest the only alternative was categorically to deny the renewal of license and thereby punish Pickard and respondent by depriving them of any chance of realizing a profit. (Something which in no wise could be of any concern to the Commission.) This point is sharply illustrated by the Commission's subsequent action in summarily denying respondent's petition for rehearing (Tr. 1751) in which a complete plan of reorganization was proffered, (Tr. 1742-1747) which would eliminate Pick-

ard entirely, and put Smith and Curtis in a minority non-voting position, as well as bring about a complete change in officers and directors, ineluctably leading to the conclusion that the Commission considered the proceeding to be one calling for the imposition of sanctions rather than one relating to the qualifications of respondent to continue to operate a radio broadcast station in the public interest.

Contrast the Commission's treatment of respondent's offer to reorganize its corporate structure so as to eliminate any basis for Commission objection to any of its officers or stockholders with the manner in which the Commission, both before and after its decision in the instant case, treated similar situations in other cases.

In *Lee E. Mudgett* (KRKO), 8 F.C.C. 227, 228 (1940), the Commission said:

> "The Commission, being fully advised in the premises, and mindful that its function as an administrative agency is not the imposition of penalties upon radio station licensees for their derelictions, except insofar as such action may result in some public benefit, but the correction of irregularities in station management and operation, as well as the encouragement and promotion of methods whereby such licensees may supply the most satisfactory public service in accordance with the Communications Act of 1934, as amended, and the rules of the Commission promulgated thereunder; and considering that the consummation of the proposals set forth in the instant applications for construction permit and assignment of license will result in an improved and entirely satisfactory public service, and the removal from the station of all the irregularities and inefficiencies heretofore found therein; the Commission concludes that public interest, convenience, and necessity will be served by granting the instant applications for renewal and assignment of the KRKO license . . ."

The foregoing statement of the Commission's statutory duty, as interpreted by the Commission itself, can hardly be reconciled with its action on respondent's petition for rehearing.

Perhaps the most striking contrast to the Commission's attitude in the instant case, considering the identity of some of the persons involved, is found in *Georgia School of Technology* (WGST), F. C. C. Docket 5903, 10 F. C. C. —, March 23, 1943, where misrepresentations provided the fraudulent inducement for successive renewals of the station license, and concealed an illegal assignment of rights granted under the license without the consent of the Commission as required by the Communications Act. In this case the Commission found that the true owner of Station WGST was a corporation which had never been licensed by the Commission to operate the station. It is significant that the same Sam Pickard, who is involved in the proceeding on respondent's renewal application, was found by the Commission to own, together with members of his family, 69.99% of the stock of the unlicensed corporation which operated Station WGST. In its decision the Commission pointed out that the legal licensee of the station had failed to assume the responsibilities and to discharge the duties of the licensee of a radio broadcast station as required by the Communications Act of 1934, as amended, and the Commission's rules and regulations. This was a case in which the record demonstrated, and the Commission found that the licensee had consistently failed over a period of years to carry out the duties and responsibilities which had been entrusted to it under its license. The Commission found that the license of the station could not be renewed under the circumstances disclosed by the record on the renewal application, but entered an order giving the licensee 60 days in which to submit evidence to the Commission that it would for the future assume and carry out the responsibilities imposed by a renewal of its license, stating that if this were done the license would then be renewed. The explanation given by the Commission for its action was as follows:

> "5. Under the present circumstances, the license cannot be renewed. However, no useful purpose would be served by refusing to renew the license under any and all conditions. Moreover, a continuation of the pro-

gram service of Station WGST under proper management will serve the public interest, convenience and necessity."

Nothing in the Commission's decision on respondent's renewal application discloses any useful purpose that would be served by refusing to renew its license under any and all conditions. Compare the result reached in the *WGST* case with the Commission's unconditional refusal to renew respondent's license, and its refusal *even to consider* any proposal of respondent, which would insure a continuation of the program service of Station WOKO under proper management. When it is considered that the basis for refusing to renew respondent's license was the fact that in the Commission's opinion Mr. Pickard, or a member of his family, was the "real owner" of a minority (and from the standpoint of any control, an insignificant) interest in respondent corporation, and that in the *WGST* case the same Mr. Pickard, or his family, was the "real owner" of 69.99% of the stock of the corporation in control of the station, it is impossible to conclude that the Commission's decision in the instant case was governed by proper statutory criteria. See also *Georgia School of Technology* (WGST), F. C. C. Docket 6534, Sept. 19, 1945.

In *WOAX, Incorporated* (WTNJ), *et al.*, F. C. C. Docket 5361, Sept. 5, 1946, the Commission found that the City of Camden, licensee of Station WCAM, had illegally transferred control of the major portion of its program service to a third party who had exploited the station "without reference to the licensee and to its duty and responsibilities to operate in the public interest under the Communications Act of 1934." The conclusion of the Commission was as follows:

"Recapitulating, the Commission proposes to . . . deny the applications of WCAM for renewal of license and modification of license, without prejudice, however, to the City of Camden filing a new application for a construction permit and license to operate on 1310 kilocycles, . . ., providing it is affirmatively shown that the

City of Camden would have the exclusive use and control of the station and that no further effect would be given to the agreements here declared to be contrary to the public interest: . . . ."

In the *WCAM* case the Commission on its own motion invited an existing licensee to submit a proposal to the Commission, which would eliminate the reasons which the Commission had given for refusing to grant a regular renewal of its existing license. To the same effect was the Commission's decision in the *Buffalo Broadcasting Corporation case,* F. C. C. Dockets 6324 and 6325, Dec. 19, 1945 (discussed *infra* pp. 52-53), and the *Joliet Broadcasting Company (WJOL) case,* F. C. C. Docket 6983, July 13, 1946.

In view of the established policy of the Commission not to delete an existing station where there appears to be a feasible way open to eliminate the obstacle to a regular renewal of license, the Commission's summary refusal to consider respondent's plan of reorganization which would have assured the non-recurrence of the misconduct with which it was charged, constitutes in law arbitrary action. The Commission's main responsibility as a licensing body, as it has been uniformly construed by the Commission itself, both before and after its decision in the instant case, is not to punish licensees for malefactions, but to encourage the use of radio facilities in the public interest by qualified licensees. Since the Commission has not exhausted its best efforts, indeed has stubbornly refused even to attempt to accomplish its statutory responsibility in the instant case, its action here cannot be judicially upheld. *Jacob Siegel Co.* v. *Federal Trade Commission,* No. 605, October Term 1945, decided March 25, 1946 (not yet reported).

The Commission's long established and uniformly followed practice of dealing with renewal applications not as a tribunal administering a penal statute, but as a licensing body exercising remedial functions, finds Congressional endorsement in the recently enacted Administrative Proced-

ure Act. *(Pub. L. No. 404, 79th Cong., 2d Sess. (June 11, 1946) § 9(b).)*

2) *The Commission's findings and conclusions demonstrate the penal nature of its action.*

Revealing as the procedural aspects of the case are on the question of whether the Commission proceeding was in substance a trial on penal charges or a hearing to determine qualifications, far more revealing is the Commission's decision itself. In its decision the Commission discusses the question of whether it is required or has authority under the statute to demand disclosure of stock interest, and concludes that it has on the theory that it is required to ascertain facts with respect to alien ownership, conviction under anti-trust laws, etc., none of which issues was in any wise involved in the instant case. Having established to its satisfaction the validity of its requirement of disclosure, it then proceeded to consider whether or not respondent, through Smith, was guilty of violating this requirement. Having concluded that respondent was guilty, it proceeded to impose a punishment, namely, denial of renewal of license. The only place in the Commission's decision in which the question of respondent's qualifications is adverted to is in the paragraph just preceding its formal conclusion. There it holds in substance that any one guilty of violating the Commission's requirement of disclosure is thereby demonstrated to be not qualified as a licensee. This might be enough to justify punishment—it is far short of enough for a determination of respondent's qualifications to continue to operate its station in the public interest. Thus, in both its procedure and in its decision the Commission ignored and failed to consider the question of whether respondent had the necessary character and other requisites to continue as a licensee of a radio broadcast station, and reached its conclusion that respondent was not qualified solely on the insufficient ground that respondent in its opinion was guilty of violating the requirement of disclosure.

The Commission's interpretation of the revocation section of the Act (312(a)) as being penal and as authorizing refusal to renew a license to punish one making a misrepresentation to it, is plain from its penultimate conclusion:

> "6. The applicant cannot deal with the Commission at arm's length, and the 'morals of the marketplace' cannot be a standard of candor under the Communications Act of 1934. *In the Matter of Van Curler Broadcasting Corp.*, 9 F. C. C. 92, 101 (1942); *In the Matter of the Mayflower Broadcasting Corp.*, 8 F. C. C. 333, 338 (1940); *In the Matter of John H. Stenger*, 8 F. C. C. 434, 444 (1940). In the performance of our statutory duties we are called upon to determine whether the operation of proposed stations or the continued operation of stations previously licensed would serve public interest. In so doing, we are forced to rely to a great extent upon the representations made in applications, in statements, and in testimony offered at hearings. It is significant that under the provisions of the Act, a station license is subject to revocation for false statements in an application. (Section 312(a), Communications Act of 1934, as amended.)"

The court below disposed of this reliance upon Section 312(a) by construing the revocation section as not conferring punitive jurisdiction upon the Commission, but properly applicable only in a case where "public interest, convenience or necessity would be served by the revocation" (R. 67-68). Even if it be assumed, however, that the section does confer penal jurisdiction upon the Commission, then that construction prevents its invocation in this case, for as mentioned above, the Government concedes, (Gov. Br. 28) that the Commission may not lawfully use its power to grant or refuse renewal of licenses as a means of punishing a licensee.

In its brief in this Court the Government abandons the contention advanced by the Commission in its decision that licensees cannot deal with the Commission "at arm's length", or govern themselves by the "morals of the mar-

ketplace''. Neither does the Government cite in support of the Commission's action, any of the three decisions which the Commission relied upon in reaching its conclusion. Since the crucial question before this Court is whether the findings and conclusions found and given by the Commission support its refusal to renew respondent's license, and not whether the reasons which the Government now advances might* if they had been given by the Commission, support its action, it is necessary to examine more closely the precedents cited by the Commission, even though they are now ignored by the Government.

The first case cited by the Commission, in its decision, *In the matter of Van Curler Broadcasting Corporation,* 9 F. C. C. 92, is a case in which the Commission was called upon to compare the qualifications of competing applicants for the same facility and decided to prefer one over the other because, among other factors, misstatements were made concerning the financing of one of the applicants. Among the other factors was the inferior program service proposed by Van Curler Broadcasting Corporation with respect to which the Commission, in the opinion cited by the Commission, stated: "We are, therefore, unable to find from this record that the applicant, Van Curler Broadcasting Corporation, would provide a well-balanced program service, or service comparable or superior to that proposed by Western Gateway Broadcasting Corporation." 9 F. C. C. 92, 102. Nothing in the Van Curler decision can be tortured into a holding that the unsuccessful applicant would have been denied solely on the basis of misstatements had there been no competing applicant presenting better qualifications for the facilities requested.

The second case cited by the Commission in its decision, *In the Matter of Mayflower Broadcasting Corp.,* an application for construction permit to establish a new station in

* We show below, pp. 39-41, that the reasons now being advanced by the Government in support of the Commission's action are no better than those given by the Commission in its decision.

Boston, was denied by the Commission on the ground that the applicant had made "*material* representations in its application which are at variance with the true facts". (Italics supplied) The representations referred to concerned the applicant's financial qualifications, and on the basis of the true facts, the Commission found and gave as a basis for its decision: "Applicant, the Mayflower Broadcasting Corporation, is not shown to be financially qualified to construct and operate the station proposed by it". The Commission did not, and indeed could not find that a disclosure of Pickard's beneficial interest in respondent would have required or justified any adverse finding by the Commission as to respondent's qualifications.

The third case cited by the Commission in its decision is *In the Matter of John H. Stenger, Jr.*, 8 F. C. C. 834. It is understandable why the Government has not also advanced this decision as a precedent supporting the Commission's action in this case. In the *Stenger* case the Commission in 1941 refused to renew the license of Station WBAX, Wilkes Barre, Pa., on the grounds, among others, that the licensee, John H. Stenger, Jr., had made false representations in applications and other documents filed with the Commission; had relinquished control over his station and his right to exercise control without the prior consent of the Commission as required by law, and had failed to discharge properly the obligations made incumbent upon him in licenses which he had received from the Commission; and that Stenger was not financially qualified to continue the operation of the station. The false statements made by Stenger were with respect to his outstanding liabilities and that they were material false statements is shown by the Commission's conclusion that on the basis of the true facts as to Stenger's liabilities, he was not financially qualified to operate the station for which he was requesting a renewal of license.

Although Stenger's license renewal was refused in 1941, he was given a series of temporary authorizations to con-

tinue to operate Station WBAX until May, 1946, when the Commission granted him a regular renewal of license. In the meantime four other applicants had filed requests with the Commission for authority to use the frequency licensed to Stenger. Stenger also filed a new application for license to operate Station WBAX and all the conflicting applications, including Stenger's, were set for hearing. After extensive hearings, the Commission on May 29, 1946, issued its decision, finding all five applicants legally, technically and financially qualified to be licensees, and further found that each applicant proposed to render "what appears to be a meritorious program service". Stenger was preferred by the Commission over the other four qualified applicants because of his "long record of experience as a technician and operator". The Commission, in its decision, repeated the findings made in 1941 when it had denied Stenger's renewal application and explicitly stated that it was not altering or changing those findings, among which were those relating to material false statements in applications and documents filed with the Commission. *In the Matter of John H. Stenger, Jr.*, F. C. C. Docket 6723, May 29, 1946.

Is it any wonder that the Government does not rely, as the Commission's decision did, on the *Stenger* case, 8 F. C. C. 434? The subsequent history of the *Stenger* case argues more eloquently than could any abstract argument, the fallacy in the Commission's decision on respondent's renewal application. Respondent's contention is that its 15 years' experience as a licensee had some bearing upon its qualifications to continue to operate Station WOKO. The Commission completely ignored respondent's record as a licensee, citing the Stenger case of 1941 (involving material misrepresentation) as a precedent for holding that concealment of information, without regard to its materiality, automatically establishes untrustworthiness to operate a radio station in the public interest. After the decision on respondent's application, and while this case was in litigation, the Commission not only found that Stenger

could be entrusted with the responsibilities of a licensee, despite the material false statements he had made in his earlier renewal application, but found him better qualified than four other applicants (admittedly qualified) because of his "long record of experience".

We submit that the Commission has throughout this proceeding treated it as one involving the imposition of sanctions or penalties rather than the determination of respondent's qualifications to be the licensee of a radio broadcast station. We believe this accounts for the Commission's disregard of respondent's previous record as an outstanding broadcasting operator. We believe it accounts for the Commission's disregard of the fact that Pickard's connection with the station involved the exercise of no control, involved no possibility of alien ownership and involved no possibility of any restraint of trade or monopoly in radio communications (the only basis upon which the Commission's decision suggests that it would be justified in asking for the information not disclosed). (R. 36) The refusal to renew respondent's license obviously stems from the Commission's view that these are irrelevant considerations on the issue of respondent's, or perhaps more properly, Pickard's and Smith's penal liability. This also accounts for the Commission's refusal to consider respondent's proposal to reorganize its corporate set-up so as to eliminate any possibility of recurrence of the derelictions which the Commission has so vehemently condemned. (R. 69, 70)

3) *The Government's arguments in defense of the Commission's action demonstrate its penal nature.*

The Government's arguments in defense of the Commission's action in this Court as well as in the court below, demonstrate that the action was taken solely because, in the Commission's view, Pickard and Smith should be punished. It urges (Gov. Br. 30):

"It is evident that the Commission can properly exercise its licensing and other functions only if it receives adequate and truthful information from applicants and licensees. There are approximately 1000 standard broadcast stations presently licensed by the Commission, and, in the near future, there will be hundreds of television stations and several thousands of frequency modulation stations. Licenses for all of these stations have been or will be authorized to a great extent upon the basis of a showing made in applications. Renewals are granted on the same basis. If a detailed investigation were required to determine the accuracy of the representations contained in each of the thousands of applications received annually, an intolerable burden would be imposed upon the Commission. Such a requirement would seriously impede, if not prevent its normal operations.[13] It is, therefore, necessary for the Commission to rely on the truth of the representations made to it. This factor, *in itself*, justifies an insistence by the Commission upon complete honesty by applicants, and *demonstrates that a finding of untrustworthiness in the dealings of an applicant with the Commission is sufficient to justify the further finding that the applicant does not have the good character which is essential for a licensee if the radio system is to be operated in the public interest.*" (Italics supplied)

This situation was obviously recognized by Congress when it legislated to impose criminal sanctions on those who make misrepresentations to the Government. There is nothing unique about the Commission's position in this regard. It is equally true of the Securities and Exchange Commission, the Federal Power Commission, the Federal Trade Commission, the Post Office Department, the Bureau of Internal Revenue, and indeed of almost all Government

[13] On the basis of information gathered for the forthcoming annual report of the Commission for the fiscal year ending June 30, 1946, it appears that during that year 3,238 applications for broadcast facilities were processed. In addition, there were many thousands of applications for authorizations in the other radio services, such as aviation, maritime, police, fire, etc.

departments and agencies. Whether or not the sanctions imposed by Congress to punish those who make misrepresentations to the Commission are adequate to accomplish their purpose is a proper concern of the Commission in the discharge of its duty to make legislative recommendations to the Congress. It cannot create artificial criteria of licensee qualifications to enlarge the area of Congressional sanctions, however inadequate such sanctions may appear to be to the Commission. As was said by this Court in *Republic Steel Corporation* v. *National Labor Relations Board*, 311 U. S. 7, 11-12:

> "We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board be of the opinion that the policies of the Act might be effectuated by such an order . . .'"

The precise argument thus repudiated by this Court is urged by the Government in the following words (Gov. Br. 32):

> ". . . application of the restrictive rule laid down by the court below would go far to destroy the effective authority of administrative agencies to require the furnishing of truthful information."

The attempt to justify what Chief Justice Groner in dissenting below described (R. 72) as:

> "The Commission's drastic order, terminating the life of the station", which, "punishes the innocent equally with the guilty, and in its results is contrary to the Commission's action in several other comparable cases"

on the ground that it will have a healthy deterrent effect on persons tempted to make false statements to administrative agencies, exposes the Government's recognition that the Commission is asserting a purely punitive jurisdiction.

The dissenting opinion of Chief Justice Groner in the court below is grounded upon his concept of "public policy". Chief Justice Groner expressed no dissent from the holding of the majority of the Court that the Commission's action was penal in nature and so intended by the Commission. In fact he characterizes the Commission's order as "drastic", he concedes that the order "punishes", that the punishment in this case affects "the innocent equally with the guilty" and that the order "in its results is contrary to the Commission's action in several comparable cases." Why considerations of "public policy" require an interpretation of the "power of the Commission to determine public interest, convenience and necessity" as broad enough to impose penal sanctions upon those who make false statements to it, Chief Justice Groner does not explain. Reference to Commission decisions on other renewal applications both before and after its decision in this case, in which misrepresentations had been made by existing licensees, shows that the Commission has uniformily held that considerations of public policy require a contrary interpretation of its licensing power. Congress has recently expressed a public policy to govern cases where licensing bodies determine that the holder of an outstanding authorization has committed some act which in the judgment of the administrative agency justifies termination of such authorization. Chief Justice Groner's concept of "public policy" is contrary to that expressed by Congress.* We are not contending that the Administrative Procedure Act was applicable to respondent's renewal application when it was pending before the Commission. We do contend

* "No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law." § 9(a), Administrative Procedure Act, *supra*.

that this statute contains an expression of what Congress has found considerations of public policy dictate in a case like the one at bar, and leaves no room for doubt that the conduct of the licensing agency must be justified as remedial and not as penal action.

The affirmance by this court of the unsupported conclusion of Chief Justice Groner as to the exigencies of public policy, *would, therefore, not merely constitute* a determination in a field committed to Congress and the Commission, but would result in the establishment of a precedent which flies in the teeth of what the Commission and Congress have explicitly found as a general policy not to be in the public interest.*

The Government's position in the instant case, we think, is completely understandable on the theory that the Commission, having decided that Smith and Pickard ought to be punished, even though punishment had to be inflicted indirectly through respondent, and having decided that their actions warranted punishment as severe as the deletion of the station, denied renewal of license for WOKO. We think the Government's contention in its brief that its actions in other cases where more serious misrepresentations were found to have been made (even where licenses were found to have been obtained by fraud) should not be considered as having any bearing in this case, is understandable on the theory that the Commission regarded its action in the instant case as the imposition of a penalty. For in such circumstances, it is not appropriate for one found guilty and punished to appeal on the ground that others found guilty of the same crime received less punishment or a suspended sentence, or no punishment at all. The Com-

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* " . . . Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements . . . " § 9(b) Administrative Procedure Act, *supra*.

mission's action in ignoring other factors highly important to any determination of respondent's qualifications to continue to operate Station WOKO as irrelevant is understandable on the theory that the Commission was determining guilt and imposing punishment, for in such case these factors would be irrelevant (except on the question of mitigation).

Particularly revealing is the Government's reiteration in its brief of the fact that the concealment was "wilful", and suggestion that if it were accidental or inadvertent or had lasted only for a short period, and had been revealed by the licensee voluntarily, a different conclusion would have been justified. (Gov. Br, 33)

There is no question but that the receipt of dividends by Pickard or Mrs. Pickard on 24 per cent of respondent's stock was intentionally concealed from the Commission. The Government's brief fails to mention that the receipt of such dividends was not concealed from the Bureau of Internal Revenue. This agency of the Federal Government, to which the facts as to the receipt of dividends was a material matter, was fully and completely informed. (Applicant's Exhibit 14-C; Tr. 1308.)

Nor does the brief advert to the fact that the Commission affirmatively found that the purpose of concealing the receipt of such dividends from it was to prevent the fact from becoming known to Pickard's colleagues in the Columbia Broadcasting System organization who felt that Pickard was receiving greater benefits than some of them from his employment (R. 30). (The purpose was not, as the Government contends in the brief (Gov. Br. 35), at variance with the Commission's affirmative finding, to enable Pickard to take advantage of his employer.) Obviously, the facts could not be kept from Pickard's fellow employees at Columbia if they were made a part of the public records of the Commission. That and that alone was the reason for not reporting to the Commission the facts as to Pickard's interest in various applications filed with the Commission.

About this there is no controversy. If this is all that the Government means by the "wilfull", the term would seem to have but little significance, for it obviously in these circumstances has no connotation of deliberate intention to mislead the Commission or any other agency of the Federal Government as to facts important to the Commission or to such other agency. It may also be observed that the Government's contention that respondent did not disclose the facts voluntarily and attempted to conceal them in the instant proceeding (Gov. Br. 34, 38) is difficult to reconcile with the fact that all of the evidentiary argument of the Commission (Gov. Br. 5-14), is based upon facts found in respondent's exhibits, as the references on those pages indicate, or in the testimony of Smith (with the exception of certain facts relating to Phelps, about which both Phelps and Pickard swore Smith knew nothing).

II.

The Court Below Properly Rejected the Government's Contention that the Commission's Action was Not Based Solely Upon the Finding that Smith had Made Misrepresentations.

The court below in passing upon the argument that the Commission's decision could be justified on non-penal grounds observed (R. 71):

> " . . . the Commission's decision must depend for validity on the rationality of the step, directly and without any other consideration, from the Commission's well-grounded finding that the real beneficial owner of twenty-four per cent of the stock had been concealed from it, to the conclusion that the appellant 'cannot be entrusted with the responsibilities of a licensee,' and the consequent additional conclusion that the renewal license would not serve the public interest, convenience, or necessity."

The view thus expressed was based upon the court's rejection of the Commission's arguments:

(a) that its administrative burden justified refusal to pass on the merits of respondent's renewal application, and

(b) that Smith's concealment of the fact that Pickard either received himself or designated the recipient of the dividends on twenty-four per cent of respondent's stock was material and important, since only persons whose qualifications had been approved by the Commission could legally receive such dividends.

Both of these contentions are renewed in the Commission's brief here. (Gov. Br. 30, 35.) We show below that they were properly rejected.

A. The number of applications filed with the Federal Communications Commission is not relevant to the issue of whether a misstatement in an application requires or justifies denial of such application.

Our contention on this point—if we may, without impertinence, paraphrase the twice-repeated (Gov. Br. 22-23, 45) full syllabled McGuffeyism of the Government—can be stated in a sentence:

But, whether there are 10 or 1000 or 10,000 applications filed with the Commission, "cannot serve to make a trivial misstatement serious or a grave falsification a matter of no consequence."

The Commission is not the only agency of government required to deal with a staggering number of applications and reports. It is plain, however, from its contentions here that it considers itself *sui generis* among Government agencies in that it does not consider the sanctions imposed by the penal code to deter the making of false statements to the Government adequate to assure the conduct of Commission business. A careful examination of the Communications Act of 1934, as amended, discloses that the Congress is either unaware of, or in disagreement with the Commis-

sion on this point. The Act does not confer upon the Commission any powers not possessed generally by other federal agencies to impose sanctions in addition to those prescribed by Congress in order to deter the making of misstatements or to prevent the concealment of facts.

It is unnecessary to labor the point in the light of the Commission's frank disavowal of this power (Gov. Br. 28). It is pertinent to point out, however, that only the existence of this admittedly nonexistent authority can support the assertion that the weight of the Commission's administrative burden justifies a refusal to pass on the merits of an application filed by one who has concealed or misrepresented facts requested by the Commission. It is also in point to observe that the Commission's implied condemnation of the deterrent effect of the penal statutes as inadequate—and this is the root of its contention—is not urged upon the basis of any failure of these statutes in operation. They have been found wanting without even a trial; no prosecutions have ever been instituted. In this field therefore the Commission cannot urge the hypothesis of special knowledge based upon experience as an offset to the hypothesis of overall wisdom of Congress.

There is no escape from the fact that this argument of the Commission is but a thinly disguised attempt to assert power to impose sanctions under a more euphemistic label.

The only other possible argument grounded on the Commission's administrative convenience is so tenuous that it is not even explicitly urged. We state it openly for them to dispose of it:

> The facts shown on the administrative record demonstrate that respondent will, if its license is renewed, continue to program and operate Station WOKO in the public interest for its renewal license period. However, at the end of that period it will be required to file a renewal application for the next succeeding period. Because of the past misrepresentations shown on the record the Commission will want careful verification of the statements in such application. But

that means more than ordinary processing. Now because the Commission has so many applications it should be excused in advance from considering an application requiring such an expenditure of administrative labor and is therefore justified in preventing the filing of such a renewal application by deleting Station WOKO.

Even if the premise of special processing were sound (we show it is not, Section III B 1), *infra*) the Commission cannot avoid passing on the merits of any future application by respondent for station license whatever happens in this case. The provisions of Section 309(a) of the Act are mandatory and control. The Commission itself has explicitly so held. *In the Matter of John H. Stenger, Jr.*, F. C. C. Docket 6723, May 29, 1946.

B. Pickard's "beneficial ownership" of 24% of respondent's stock was not material under the Communications Act of 1934, as amended.

The Communications Act (as did the Radio Act of 1927) evidences a Congressional concern that the Commission "discover and prevent any alien, criminal, or other improper control of radio broadcasting stations, and to guarantee so far as possible an independent, wholesome policy in management and operation." *Heitmeyer* v. *F. C. C.*, 95 F. 2d 91, 99. As the court below pointed out in that case, the Congressional concern is manifested in the language found in the Act. For example, in laying down its restriction to prevent alien control of corporate licensees of radio broadcast stations, it enjoins the Commission from issuing a license or permitting a license to be transferred to a "corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned *of record* or *voted* by aliens or their representatives." (Section 310(a)(4) (Italics supplied.). It is evident that the Congressional concern is not with the identity of a person who may receive stock dividends from a licensee corporation, but with whether a person who is legally empowered

to vote more than 20% of the stock or to exercise any other right of a registered stockholder is an alien.

It would obviously not be a violation of the Statute for the Commission to permit a guardian of an alien infant to invest a portion of the infant's estate in radio station stock provided that the guardian was an otherwise qualified citizen of the United States and that the alien infant had no control over the guardian but was merely to be the beneficiary of stock dividends. Nor would it be a violation of the Statute for the American Red Cross to purchase radio station stock with funds given it to endow rehabilitation activities for citizens of other countries. The dividends of the stock in such a case would, of course, go to the benefit of aliens as would the proceeds of the sale of such stock by the Red Cross, but the alien beneficiaries would have no right or power to exercise any control over the radio station operation. To cite another example, the Commission is not infrequently called upon to approve the transfer of control of stock in a radio station licensee corporation to an executor or administrator of an estate. In such a case it is the qualifications of the administrator, although he is certainly not the beneficial owner of the stock, rather than the qualifications of the heirs or legatees whose identity may not even be known at the time of the approval of the transfers which determines whether or not the Commission will consent to the requested transfer. In short, it is manifestly not the purpose of the Act to restrict the distribution of profits of a radio broadcast station to persons who by definition are qualified to become licensees or hold a controlling stock position in a licensee corporation.

In the instant case two facts stand out with respect to Pickard's ownership of 24% of respondent's stock. First, it did not give him, nor did he desire to have, any control over any of respondent's actions; and second, he never from the time respondent corporation was organized nearly fifteen years ago, attempted directly or indirectly in any way whatsoever to exercise any rights or prerogatives as a stock-

holder other than the right to collect dividends himself or to have such dividends paid to a nominee of his choosing.

The arithmetic of respondent's stock distribution which, as the Commission formally finds in its decision, (R. 23) was not fortuitous but was designed to prevent Pickard from exercising any control of respondent corporation, precluded any voting of Pickard's stock from ever having the slightest significance at any stockholders' meeting. Any issue acted upon at such a meeting would be determined by Smith and Curtis if they voted the same way, or by Curtis and The Press Company if they voted the same way, or by Smith and The Press Company if they voted the same way. This is obvious since Smith and Curtis each hold 25½%, a total of 51%; Curtis and The Press Company hold 25½% and 25% respectively, making a total of 50½%; and Smith and The Press Company hold 25½% and 25% respectively, a total of 50½%. All corporate action by respondent, therefore, was necessarily subject to the absolute control of any two of these three stockholders. It is consequently indisputable that the remaining 24% of the stock was a factor of no consequence whatsoever, so far as control of the respondent corporation was concerned. Even assuming that Pickard could at any time after the issuance of the stock have voted it, and assuming further, (*contrary to fact,*) that he did vote it, any such vote would have been meaningless. So far as anything except dividends was concerned Pickard might as well have had *one* share as 240 shares. He would in fact have had no less control, had the 240 shares been non-voting shares. He would have had as much if instead of stock he had an assignable contract for 24% of the profits of the respondent corporation before dividends and after taxes. Therefore, no non-disclosure, concealment, or misrepresentation concerning the ownership of the Pickard's interest in this stock operated, or could have operated, in any way to affect the Commission's duty to make a determination concerning the control of respondent corporation and take any appropriate action upon such

determination. All of the facts necessary to make any determination concerning the identity of persons who could or did control respondent corporation were supplied to the Commission by Smith on behalf of respondent. (See Sec. 310(b).)

The Commission's decision (conclusion 3, R. 36) contains the following statement of reasons why it was required to know the identity of the Pickards as the persons having beneficial ownership of 24% of respondent's capital stock:

> "3. In administering its statutory duties under the Communications Act of 1934, this Commission is called upon to scrutinize carefully the applicant's qualifications, as set forth in Section 308(b); to determine whether the citizenship requirements of Section 310 have been met; to inquire whether the applicant or parties in interest have been adjudged guilty of violating the antitrust laws as set forth among other provisions of Section 311 and Section 313. In deciding whether the proposed operations would serve "public interest, convenience or necessity," consideration must be given to the character, background, and training *of all parties having an interest* in the proposed license. It is, therefore, apparent that the performance of this statutory duty requires full information about *each of an applicant corporation's stockholders.* The failure in this case to disclose that the Pickards were stockholders in WOKO, Inc., prevented a determination of their qualifications and fitness under the Communications Act."

It is conceded that there was no concealment of antitrust conviction involved in this case. (The specific questions in the renewal application as to this point were categorically answered (see R. 8, 13) and these answers are not challenged.) Nor was there any concealment of stock ownership held "of record or voted by aliens". (Pickard's citizenship is not merely conceded but had been affirmatively passed upon by the Commission, else he could not have held office as a Vice President of Columbia, the licensee of sev-

eral radio stations.) The only charge is concealment of "benficial" ownership.

The italicized words quoted on p. 30 paragraph furnish the clue to the lack of relevance in the last sentence of the Commission's conclusion. The statute does not require, and the Commission does not, by rule or regulation, application, form or report, or by any procedure formal or informal, either give consideration to or seek facts concerning "the character, background and training of *all* parties having an interest" in a proposed licensee—neither does it seek "full information about *each* of an applicant corporation's stockholders". The concern of the Commission is, in practice, quite properly confined to the qualifications of those whose financial interest or stockholding gives them control or a substantial measure of control over the corporation. Information relating to others is only sought to determine whether such control exists.

The Government will not deny that the reason why the Commission requests information as to the identity of persons holding 10% or more of the stock of an applicant for a license or of a licensee corporation is that under some circumstances such persons, although not controlling a majority of the stock, may nevertheless be able to wield a strong, if not decisive, control over corporate action. Such working control, of course, can exist only where a majority of the stock is not held closely, as, for example, in many large corporations where the largest single block of stock owned by any individual may be not more than 10 to 15 or 20%. In such a case a 10% holding concentrated in any one person may become an important factor in potential control. But that is not this case. The conclusion is inescapable that the Pickard stock ownership in respondent corporation was and is a fact of no consequence to the Commission as a licensing body; and that the failure of respondent through its officers to disclose the facts with respect to the Pickard ownership of such stock in no way frustrated, hampered, or impeded the Commission in the discharge of its functions,

or respondent in the discharge of its responsibilities as a licensee.

It is disconcertingly easy to confuse the effect upon control (or disqualification through proscribed alien interest) of a 24% stock interest in a hypothetical case, which may justify an arbitrary requirement of disclosure of such interest in all cases, with the question of its importance in any actual case. It may not be material that the facts in many, if not most cases, will show that a 10% stock interest constitutes neither a factual nor a legal possibility of control—it may be enough that there is a probability that in some cases the possibility will exist, to justify a regulation requiring disclosure in all cases of the identity of persons holding 10% or more of the stock of a corporate applicant or licensee. It is not necessary here to contest the validity of such a requirement. It is enough to point out the obvious fact that any requirement of disclosure of less than 50% will elicit facts in at least some cases which are of no consequence. For example, if A owns 50.001% of the stock of an applicant or licensee, no control can be exercised by the owner or owners of the remaining 49.999% of the stock. (In fact, barring proportional representation provisions in the charter or by-laws, no audible voice in corporate affairs in such a case is possible.)

It is, of course, immediately obvious that required disclosure with respect to smaller and smaller stockholdings will elicit more and more facts, a lesser and lesser percentage of which will be material. This, to repeat, is not an argument against the validity of a regulation requiring such information, but records an obvious, though frequently overlooked, observation concerning the operation of such regulations. The point we make, and it is crucial, is that although such a regulation is *not necessarily* shown to be invalid because in operation in a particular case it produces a trivial or meaningless result—the result it produces is neither important nor material in a particular case simply

because the hypothetical (or actual) case which justified it is of extreme importance.*

Justifying repetitiousness by the importance of the point, we restate it in terms of alien ownership. Assume that the Commission, in order to insure that no corporate licensee will have 20% or more of its stock owned by aliens, promulgates a regulation requiring the submission of information by corporate applicants for license and by corporate licensees showing affirmatively that 81% of the stock of such corporations is held by citizens of the United States. We may assume further, without any discussion, that such a regulation would be valid and that refusal to comply with it or purported compliance through misrepresentation would justify the imposition of a criminal penalty. We may safely presume that such a regulation in the case of corporate licensees would not, as of today, produce in any single case information showing proscribed alien ownership. Obviously the fact that no information evidencing improper alien control would be filed in response to this regulation, would not be a sound argument against the validity of the regulation. If in response to this regulation some corporate licensee reported that a substantial block of its stock was held by A, a citizen, whereas, in fact it was held by B, also a citizen, the regulation would be violated just as much as if B, the real stockholder, were an alien, notwithstanding that the information supplied would not have been calculated to deceive the Commission on the question of citizenship, would not have affected any action the Commission is required to take because of citizenship,

* To illustrate by an apt, if somewhat pedestrian example: A 6 mile per hour speed limit in a school zone may be amply justified as a protection to kindergarten children. Jones, who is convicted of driving through the zone at 20 miles per hour, cannot be charged with wanton disregard of human life if he (admittedly and correctly) believed that all of the children were at the circus when he drove past the school. Guilty of violating the ordinance made and provided to protect the life and limb of young children, Jones is nevertheless not guilty of wanton or careless disregard of human safety—or lacking in qualification to operate an automobile.

and would not have affected the qualifications of the corporation insofar as citizenship is concerned. In a consideration, however, of whether the license of the corporation should be renewed, very different considerations would obviously apply. If the amount of stock involved was 20% or more, the Commission could not renew the license if B were an alien; it could not refuse to do so if B were a citizen and the violation of the regulation could not be shown to justify a conclusion of lack of responsibility in the corporation involved.

It is a plausible *non sequitur* to argue that, since it would be illegal to license or renew the license of a corporation more than 20% of the stock of which was held by an alien; and that concealment of the identity of a stockholder holding more than 20% might well be for the purpose of inducing an illegal granting of the application; any applicant guilty of concealing a 24% stockholder thereby proves itself irresponsible and unreliable to a degree that no finding of its ability to operate in the public interest, convenience, or necessity could possibly be made; and therefore the renewal application of such a corporation should be denied. It is indeed difficult in this case *not* to consider the failure to disclose facts with respect to the ownership of 24% of the respondent's stock in terms of what might have been the effect of such a nondisclosure or concealment had Pickard been an alien or had the corporation been so set up that through it he might have exercised a control not known to the Commission, or approved by it. Such speculations point beguilingly to the conclusion that respondent's renewal should have been denied. They are, however (notwithstanding that they might be relevant to a consideration of the validity of the Commission's requirement of disclosure), entirely irrelevant in a proceeding not having for its purpose the imposition of punishment for violation of the regulation, but restricted to the question of whether respondent is a qualified licensee; for on the question of respondent's qualifications, it is not what might have been the purpose

and effect of a concealment or nondisclosure of the substantial stock interest *in some other case* that controls. Respondent's qualifications insofar as they are affected by any other nondisclosure require consideration of the purpose and the effect of the nondisclosure that actually occurred.

It cannot be assumed, in endeavoring to relate any culpability that respondent may have to its qualifications, that respondent was trying to conceal an illegal alien participation, or a hidden working stock control. Facts rather than assumptions must be relied upon, and the facts show that Pickard was qualified to hold a minority stock interest in respondent corporation. They also show that the 24% stock interest attributed to him by the Commission was not, and could not have been, a factor in the control of respondent corporation. Nor can it be assumed that the purpose of any concealment of the Pickard interest was to mislead the Commission on a matter which was, or was thought to be, of concern to it, or that any such concealment was intended to or did induce or influence the Commission to take any action or refrain from taking any action it would not have taken had a full disclosure been made. The contrary facts shown by the record and not denied by the Commission must determine these questions also. In short, it is submitted that, even if a violation of a proper Commission regulation and the propriety of the imposition of some penalty therefor in a proper proceeding be conceded, the uncontradictable facts showing the trivial and inconsequential nature of the concealment, the admitted fact that its motivation had nothing whatsoever to do with the Commission, and the fact that the concealment itself in no way affected the Commission, preclude a conclusion, based upon the fact of such concealment alone, that respondent is not qualified to continue operating its station in the public interest—particularly in the face of a 15-year record of outstanding performance in the public interest in the past operation of the station.

The Government argues (Gov. Br. 35-36) that Pickard does not possess the necessary qualifications to be a station licensee, notwithstanding the facts that admittedly he is a citizen of the United States, admittedly he has never been guilty of any violation of the anti-trust laws, admittedly he held office as a member of the Federal Radio Commission (in which position presumably he acquired some knowledge of the laws, regulations and Commission policies governing operation of radio broadcast stations), and that he held office as Vice President in charge of station relations with the Columbia Broadcasting System, licensee of several radio stations, in which position it was his duty to advise and consult with radio stations affiliated with Columbia on various problems of station operation and policy. It is not necessary for the purposes of this case to argue that this background qualified Pickard to be a licensee of a radio broadcast station. It is only necessary to point out that it qualified him to hold a minority stock interest, entitling him to the dividends on 24 per cent of respondent's stock, under a stock distribution which precluded him from exercising any voice as a stockholder through the voting of such stock. Considering the fact that corporations, stock in which is admittedly beneficially owned by infants, incompetents, unknown heirs and others possessing none of these qualifications, not to mention corporations whose stock is bought and sold on the market, have been found by the Commission to be qualified to operate broadcast stations, it is hardly necessary to labor this point. (The Commission apparently does not dispute Pickard's qualifications to hold this stock since it made no adverse finding with respect to Pickard's qualifications in its decision.) There is no way in which counsel for the Commission can argue with even surface plausibility that the fact that Pickard received himself or had the power to designate the person who would receive dividends on 24 per cent of respondent's stock was or could have been material in any Commission proceeding involving the renewal of license of Station WOKO.

It was the position of the court below that the lack of materiality of the facts concealed in the instant case, the admitted fact that the concealment was not intended to and did not influence the Commission in any way, and the admitted fact that the motivation for the concealment was a purely private and completely unrelated business concern of Pickard's, out of which no other stockholder, officer, or director of respondent or respondent itself received any benefit whatsoever, are sufficient in and of themselves to make the non-disclosure meaningless so far as respondent's qualifications to operate a radio broadcast station are concerned. The Government has failed to show any reversible error in this holding.

It is obvious from the foregoing that the Court below correctly stated the real question in the case as being:

> "Simply stated, the question in this case is whether it is logical and rational to say that a licensee cannot be entrusted with further responsibilities for the sole reason that, over a term of years, one of its officers has concealed from the Commission the identity of a beneficial owner of twenty-four percent of its capital stock" (R. 71).

III.

The Court Below Properly Held That It Is Not "Logical and Rational to Say That a Licensee Cannot Be Entrusted with Further Responsibilities (to Program and Operate a Radio Station) For the Sole Reason That, Over a Term of Years, One of Its Officers Has Concealed From the Commission the Identity of a Beneficial Owner of Twenty four Per Cent of Its Capital Stock."

A. The Government's contention that the court below held that the Commission is required to consider and pass upon unrelated qualifications of an applicant for renewal of license properly found to lack an essential qualification—or to possess a basic disqualification—is based upon an improper interpretation of the opinion.

The Government contends vigorously (Gov. Br. 41-49) that the decision of the court below is in error because it requires the Commission to consider unrelated factors such as a station's past program service and the licensee's investment, in a case where it has found the station applicant for license renewal wanting in the minimum character requisites to serve public interest, convenience or necessity.

The court below *did* say that the Commission's decision should have given consideration to these points as well as the question of whether earlier disclosure of the true facts with respect to the Pickards' receipt of dividends would have resulted in refusal to renew the station license on a previous application or in refusal to grant permission to construct it. The court *did not*, however, even by remotest implication suggest that additional findings would have been necessary had the Commission's finding that respondent could not be "entrusted with the responsibilities of a licensee" been well founded.

The court very carefully considered the question of whether what it called the Commission's "warranted conclusion" of misrepresentation would justify denial of the application standing alone, and found that it would not, as the Commission had no power to refuse a renewal of license to punish respondent (a point the Government now concedes, *supra* pp. 6-7). The court also considered the question of whether it could find on the record in the light of the statute—since there was no Commission finding that disclosure of the true facts concerning Pickard's receipt of dividends would have been material in that they would have justified or required any action by the Commission on past application different than it had taken—any basis was found for holding the misrepresentations and concealments material. The court could find no such basis.

The Government now suggests (Gov. Br. 35-36) that Pickard was not qualified to receive dividends on respondent's stock because:

(a) he was disloyal to his employer Columbia Broadcasting System; and

(b) he was a network official and it *might* be adverse to the public interest for a network official to hold stock in an independent radio broadcast station.

As to (a) it is (1) a highly doubtful inference from the testimony (Tr. 115-116, 164-165, 167-168, 171) and (2) it was *not* found to be a fact by the Commission in its decision or in any document filed by it pursuant to Section 402 (c) of the Act. The Commission, therefore, as an expert body either did not think the contention advanced by its counsel in the brief filed in this Court sound—or it did not consider the matter when the case was before it.

As to (b) the Act is silent. Assuming, however, that the Commission may nevertheless speak authoritatively on the point *it did not do so.* Congress has not authorized the Solicitor General nor the Commission's legal staff to determine policy in this field. But even if it had, any policy so established cannot stand against a formal Com-

mission proclamation on the point. The Commission has considered the question; on June 6, 1946, it said:

> "The testimony presented by the joint petitioners in support of their respective applications indicates that both petitioners are legally, technically, financially, and otherwise qualified to construct and operate a standard broadcast station and that the public interest would be served by the granting of their applications. The application of Wabash Valley Broadcasting Corporation, however, raises a question of policy since one of its stockholders, Robert E. Hinckley, is an officer of the American Broadcasting Company. In the Commission's opinion, a serious question is raised concerning the desirability of a network official or stockholder owning any interest in a broadcast licensee, since other stations operating in the same community would be at a competitive disadvantage in attempting to secure a network affiliation with the network in question. The Commission is aware, however, that this is a question of broad application, and at the present time the Commission is considering the promulgation of a proposed rule governing this matter, upon which interested persons would be given an opportunity to be heard. Mr. Hinckley has advised the Commission that if a policy is adopted by the Commission against ownership by network officials of interests in broadcast licensees, he would relinquish his interest in the applicant. On the basis of this understanding, the Commission concludes that there is no objection to a grant of the application of Wabash Valley Broadcasting Corporation." (*In re application of Wabash Valley Broadcasting Co.*, F. C. C. Docket 6924, June 6, 1946.)

It is of the greatest significance that, although participation in independent station ownership by network stockholders or officials is far from uncommon, the only official statement of the Commission on the point is the one quoted above. That the above-expressed policy would have no application to the instant case is evident, since the facts of the instant case show without dispute that when Pickard

obtained his stock interest in respondent *WOKO was the only broadcast station in Albany.* (When this case was decided there was one other station in Albany—*but* 67½% of that station was and is owned by the same persons who own 76% of respondent's stock. R. 23-24.) Beyond controversy, therefore, the court below was, despite its attempt to find a justification for the Commission's conclusion of respondent's "untrustworthiness", unable to find in the Commission's published precedent or policy any basis for holding the actual facts as to the Pickards' receipt of dividends material or significant.

The court pointed to the absence of any finding by the Commission on the obviously relevant question of WOKO's past operation and turned to the administrative record to see whether the evidence there would require an adverse finding. Examination of the record disclosed—and this is not disputed by the Government—that there was no evidence whatsoever of any kind upon which a finding of improper past operation could be based. On the contrary the evidence, not disputed or impeached, showed that the station had always operated in the public interest. The court below therefore concluded that the Commission's failure to make an adverse finding on this point which would have furnished support for its conclusion of "untrustworthiness" was no mere formal or technical omission.

It is plain from the decision of the court below that if the Commission's findings had rationally supported its conclusion that respondent lacked fitness to be a licensee, the Commission's decision would have been affirmed. The court held that, in this particular case, other considerations besides the misrepresentation with which respondent had been charged should have been considered as bearing upon respondent's fitness to be a licensee. This is not the same as holding that in determining the ultimate question of respondent's qualifications it was necessary for the Commission to go beyond a proper conclusion as to the lack of any requisite qualification. There is no question but that if the

Commission had properly concluded that respondent was lacking in one requisite qualification, whether that was a legal, financial or technical qualification, or lack of "trustworthiness" to be a licensee, it would have been unnecessary for the Commission to balance the lack of one qualification against other qualifications that respondent might have possessed in order to determine whether its license should be renewed.

The court's reference to respondent's past record as a licensee was made as indicating that this had some bearing on the issue of respondent's qualifications to continue to be a licensee. Findings as to respondent's past program and technical service conceivably might have lent support to the Commission's conclusion that respondent could no longer be entrusted with the responsibilities of a licensee. Conceivably they might have supported a contrary conclusion. In any event, respondent's record of performance as a licensee over a period of some fifteen years was considered by the court below as having some bearing on the question of respondent's fitness to continue as a station licensee, and in failing to advert to respondent's past performance as a licensee, the Commission necessarily omitted one relevant factor in reaching its conclusion. Since the question before the Commission in the instant proceeding was the fitness of respondent to carry out the duties and responsibilities of a licensee, certainly the past record of the respondent in carrying out such duties and responsibilities had some relevance to the conclusion as to whether respondent did or did not possess the requisite fitness.

Nor did the court below hold, as the Government would have it appear, that the value of respondent's property devoted to broadcasting purposes had any bearing upon the qualifications of the respondent to continue to operate Station WOKO in the public interest. The court below did point out that the large investment which respondent has in physical properties is one reason why the Commission should not arbitrarily take action which would result in

the utter destruction or severe deterioration of substantial property values (R. 70). Compare the court's expression on this point with the language in the decision of the Commission in *In re Application of Buffalo Broadcasting Corporation*, decided December 19, 1945, quoted *infra* p. 53.

The Government argues that the court below overstepped the boundary between judicial and administrative functions and substituted its own judgment for that of the Commission on a matter entrusted to the discretion of the Commission by the Communications Act (Gov. Br. 40). The court below held that the conclusion that respondent could not be entrusted with the responsibilities of a radio station licensee did not follow from the finding that respondent had made a misrepresentation to the Commission, the only basic finding made by the Commission in support of its conclusion. The sufficiency of the Commission's findings to support its conclusion is a matter within the proper judicial power of the court below to determine under Section 402(e) of the Act. *Federal Radio Commission* v. *Nelson Bros.*, 289 U. S. 266. See also *National Labor Relations Board* v. *Columbian E. & S. Co.*, 306 U. S. 292, 301.

B. There is no relationship between the non-disclosure of Pickard's minority stock interest and the ability of respondent to discharge the responsibilities of a licensee to serve public interest, convenience and necessity.

The court below put this point succinctly in the concluding sentence of its opinion (R. 72):

> "Under the situation disclosed here, we conclude that the Commission acted arbitrarily in proceeding from its warranted conclusion that the stock ownership had been misrepresented to it, to the drastic decision that the continuance of the license would not be in the public interest, with the concomitant results of disestablishing an established and satisfactory radio station and of imposing upon its corporate owner the entire

loss of its good will and the serious impairment of the value of its capital assets."

The court did not seek to minimize Smith's deception; on the contrary before reaching this conclusion it pointed out that (R. 72):

> "The Commission was quite justified in feeling vexed at the deception, and perhaps would have been justified in seeking criminal prosecution of Smith, or of the appellant itself."

Nevertheless, it was impelled to hold:

> "but to say that this concealment, which did not induce or influence its former grants of renewal licenses, alone supports a conclusion that public interest, convenience, or necessity would not be served by the renewal, is in logic a non sequitur."

Respondent has for over fifteen years fully and adequately discharged its responsibilities as a licensee to render a proper technical and program service to the residents of Albany and surrounding areas, despite the concealment of the Pickard stock interest. It cannot be argued that the disclosure of the Pickard interest will prevent respondent from discharging such responsibilities in the future. The very fact that information as to the Pickard interest in respondent was concealed over this entire period, which the Government stresses as aggravating the offense, argues against, rather than in support of the Commission's conclusion as to respondent's qualifications. Only on the assumption that respondent would be less able to render a proper technical and program service to the public with the Pickard interest made a matter of public record than it was able to do while that information was being withheld, can the Commission's conclusion be sustained.

1) *It does not follow from the fact that the Pickard stock interest was concealed that respondent cannot be entrusted with the duties of a licensee to file truthful applications and reports to the Commission in the future.*

There is no basis in the record for a determination that any misstatement of fact concerning the ownership of stock in the respondent was characteristic of the statements made to the Commission regarding other matters, or that the respondent was likely to be untrustworthy in the future. On the contrary, the record demonstrates that this alleged misdeed is the only fault committed by the respondent during a period of broadcasting extending back to the earliest pioneering days of the industry. It was committed at a time when the standards consistently applied by the regulatory agency were not the same as those imposed by the Commission in recent years.* In all other respects the record of the respondent has been exemplary, and there is not the slightest scintilla of evidence in the record to connect the misrepresentation as to the Pickard ownership of stock with a possible future misrepresentation by respondent or with the possibility of harm to the public if the station is allowed to continue on the air. Moreover, a conclusion as to respondent's truthfulness and sense of responsibility, which adverts only to the misrepresentation of an immaterial fact, and does not take into consideration an unblemished record of fifteen years of complete reliability and the truthfulness on every material fact submitted to the Commission, cannot be reconciled with the requirement that the Commission must in all cases exercise a *sound or sensible* administrative discretion.

2) *The licensing experience of the Commission demonstrates that the concealment of the Pickard's stock interest does not justify the conclusion that respondent lacks qualification to continue as a licensee.*

The Commission's assumption that if a licensee is found to have made a misrepresentation to the Commission or

* See *In the Matter of Segal and Smith*, 5 F. C. C. 3.

to have concealed facts from the Commission, it automatically follows that he cannot thereafter be entrusted with the responsibilities of a licensee, can be demonstrated to be unsound by the Commission's own experience.

The licensing problem presented to the Commission by respondent's renewal application was not a novel one. There have been many instances throughout the history of the Commission and its predecessor, the Federal Radio Commission, in which applicants for new stations or renewal of license have been found to have made false representations to, or deliberate concealments from the Commission. Throughout the years there has been evolved a consistent unvarying administrative interpretation of the Commission's statutory duty in such cases.* It has always been the Commission's interpretation of the Communications Act that its duty in such cases is to consider the proof of false statements as a factor but not as the conclusive factor in determining the qualifications of a new applicant or a licensee for a renewal of license.**

In 1939 the Commission designated the renewal application of Station KIEV for hearing for reasons involving the

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* E.g. Panama City Broadcasting Co. (WDLP), 9 F. C. C. 208 (1942); Ocala Broadcasting Co. (WTMC), 9 F. C. C. 223 (1942); Red Lands Broadcasting Ass'n et al., 8 F. C. C. 473 (1941); East Texas Broadcasting Company (KGKB), 8 F. C. C. 479 (1941); Lee E. Mudgett (KRKO), 8 F. C. C. 226 (1940); Cannon System, Ltd. (KIEV), 8 F. C. C. 207 (1940); Navarro Broadcasting Ass'n (KAND), 8 F. C. C. 198 (1940); Georgia School of Technology (WGST), 10 F. C. C.—March 23, 1943; In re application of Buffalo Broadcasting Corporation, F. C. C. Dockets 6324 and 6325, December 19, 1945; In Re application of Hiawathaland Broadcasting Co. (WSOO), F. C. C. Docket 6208, September 12, 1945; In re FM Radio and Television Corporation, F. C. C. Docket 6928, October 16, 1946.

** So far as counsel has been able to discover, there is no reported case in which the Commission has refused to renew a license on the ground that the licensee had made a misrepresentation, notwithstanding that in many reported cases the misrepresentations which the Commission has found were with respect to material facts bearing directly upon the qualifications of the licensee to operate a station and the licensee's past or future proposed radio service.

station's program service. After the hearing the Commission found that the disparity between the program service proposed in the original application and the programs actually broadcast by the station indicated such a disregard of the representations made as to cast doubt on their sincerity in the first instance. In addition, the Commission found that false statements of talent expenditures were made in successive renewal applications. After reciting the facts developed by the record, the Commission stated:

> "Upon all the facts, however, it has been concluded not to deny the pending application. The record shows that attempts to improve programs have been made. An additional member has been placed on the staff with the duty of arranging programs of a civic, educational, and charitable nature. The percentage of time devoted to recorded music and to commercialization has been reduced, and the remainder of the program schedule dedicated to diversified non-recorded program material. News programs have been added and a 5-year contract entered into with the United Press. Religious programs are being prepared by the Ministerial Association. Local civic and fraternal organizations are being more actively assisted in the preparation of programs. To a substantial extent the public has come to utilize the transmitting facilities and the broadcast service." *Cannon System, Ltd.* (KIEV), 8 F. C. C. 207, 210 (1940).

In the instant case the Commission gave no consideration to the service of the station and to the scrupulous compliance by the respondent with every rule and regulation of the Commission governing both technical and program operation, nor did it even attempt to relate the alleged past misrepresentation to the future service of the station. In considering the past conduct of the respondent, insofar as its service to the public is concerned, the only possible finding that could be made as to the probable future conduct of the respondent is that it would be of the highest caliber. It is important to bear in mind that in this case the Commission did not find that the future service of the respon-

dent would not be in the public interest. It obviously could not make such a finding. This vital point was ignored by the Commission. Indeed, when the respondent offered testimony as to its program service at the hearing, Commission counsel objected to its introduction as being "immaterial and besides (*sic*) the issues." (Tr. 1036) In issuing its proposed decision, which was later made the Commission's final decision, not a word was said about the service which Station WOKO has been rendering and would continue to render to the public in the Albany area. (R. 23-28) It is our position that in the absence of any finding as to the probable future service of the station, and in the absence of any finding that respondent possessed a statutory disqualification, the Commission's action in refusing to renew respondent's license was in law arbitrary and capricious.

In a group of cases involving a number of Texas stations, the Commission found that the licenses of Stations KTBC, Austin, Texas, KNET, Palestine, Texas, KRBA, Lupkin, Texas, KSAM, Huntsville, Texas, KGFI, Brownsville, Texas, and KGKB, Tyler, Texas, had either been obtained through false and fraudulent representations to the Commission concerning their financing and ownership, or had been transferred or assigned without Commission consent, or both, in contravention of the Communications Act and the Commission's rules and regulations. In these cases, also, the Commission vacated its revocation orders on the grounds that no charge had been made that the program service of the stations was not in the public interest; that the licensees of the several stations were responsible citizens in good standing and repute in their respective communities; and that to delete the stations would deprive all the communities of valuable broadcast services. *Red Lands Broadcasting Association et al.*, 8 F. C. C. 473 (1941); *East Texas Broadcasting Co.*, 8 F. C. C. 479 (1941).

In two comparatively recent revocation proceedings, the Commission applied the criteria which respondent contends

must govern actions by the Commission which involve the possible deletion of an existing radio station. In the cases of *Panama City Broadcasting Company, Inc.*, 9 F. C. C. 208 (1942), and *Ocala Broadcasting Company, Inc.*, 9 F. C. C. 223 (1942), the Commission found that it had been grossly misled in granting the licenses of WTMC, Ocala, Florida, and WDLP, Panama City, Florida, without disclosure of the identity of the real party in interest in either application. Unlike the instant case in which the Commission found that respondent had misrepresented the beneficial ownership of an unimportant minority interest in its stock, in the *Ocala* case and the *Panama City* case the Commission found that there had been a misrepresentation as to the true owner of the entire station. In both cases the Commission found that the deception was deliberate and the culpability clear, but nevertheless vacated its prior order of revocation on the grounds that the two stations were rendering outstanding public service, that the true party in interest had demonstrated his fitness to be a broadcast licensee, and that the communities served by the stations would otherwise be deprived of an essential public service.

Respondent is not arguing that the doctrine of *stare decisis* required the Commission to renew the license of WOKO. We do not contend that the decision of the Commission in any of the cases discussed above is binding on the Commission in the sense that it could not legally reach a different result on the WOKO renewal application. We concede that the Commission's decision must be governed by the facts developed in each case. *Courier-Post Publishing Company* v. *Federal Communications Commission*, 70 App. D. C. 80, 104 F. 2d 213. We do contend, however, that the statutory criteria applicable to the determination of renewal applications are the same in all renewal proceedings. The meaning of the Communications Act does not change from case to case. The Commission's duty to consider all relevant factors bearing upon the ability of the licensee to continue to operate its station is the same

in the instant case as it was in all previous cases in which the Commission has acted on renewal applications. It is our position that the Commission's unvarying administrative interpretation of what it is required to do by the Communications Act in passing upon an application for renewal of license is correct and that its departure from the statute in the instant case constituted reversible error.

The Commission itself has recognized this principle many times. Its most recent statement on the point is found in its decision in *The matter of Powell Crosley, Jr., Transferor, and The Aviation Corporation, Transferee*, F. C. C. Docket No. 6767, decided September 6, 1945, (not yet reported). The Commission there stated:

> "A majority of the Commission, however, believe that on the full record before it the Commission has no alternative but to grant the application unless the uniform precedents of seventeen years of radio regulation are to be ignored and a complete reversal of administrative policy is to be adopted. While an administrative agency is not bound by the doctrine of *stare decisis* we believe that sound public administration demands respect for established policies. We believe that any change in policy as fundmental as the one advocated by the minority should, if it is to be effective, be brought about by legislation or by rules and regulations of general applicability. If matters of such importance are left to case-to-case decisions, basic policies can be expected to shift back and forth with changes in membership of the Commission making it impossible for the public to know from one day to the next what the policy is. We believe that administrative agencies such as this Commission have an obligation to adhere to uniform policies, and when developments dictate a change, to adopt after appropriate notice a rule of general application so as to avoid the color of discrimination in a particular case.
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> "Moreover, acceptance of most of the minority's reasoning would, if it were uniformly applied to other cases, create a chaotic situation in the broadcast industry which, as will be shown, would cast doubt on the status of a great many licensees when they next come up for renewal."

The uniform precedents of over seventeen years of radio regulation establish beyond question of doubt as the proper interpretation of the Communications Act of 1934 and of the Radio Act of 1927 (which on this point is precisely the same) that failure to make a complete disclosure to the Commission, whether or not coupled with misrepresentations to effectuate a concealment, even of material matters, is not in and of itself a basis for holding the person responsible *lacking in qualification to be the licensee of a radio broadcast station.*

We do not for a moment suggest that the facts concerning concealment of any material matter, or any misrepresentation made to further such concealment, may not be relevant factors in determining whether or not the applicant responsible for them is qualified to become a licensee or to continue as a licensee. We do contend that other factors are of an equal, and in many cases, including the instant one, of far more importance in making such a determination. The Commission itself has consistently interpreted the Communications Act of 1934 as requiring it to evaluate all factors bearing upon the qualification of an applicant in deciding whether to grant or refuse a renewal application. "Consistency in administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily. Under such circumstances, affirmative orders violate administrative discretion and become punitive, rather than remedial measures . . ." *National Labor Relations Board* v. *Mall Tool Company,* 119 F. 2d 700, 702. The standards which the Communications Commission and its predecessor, the Federal Radio Commission, have consistently applied in cases involving a renewal of radio station licenses have been those bearing upon the *question of the qualifications of the applicant to continue to operate its radio broadcast station in the public interest.* Instead of applying such standards in the instant case, the Commission confined itself to a determination of whether in the past the applicant had been guilty of

violating any Commission requirement of disclosure of information. The Commission's conceded function in such cases is to determine questions of public interest, not whether individuals should be punished for past wrongdoings.

The Commission's decision on respondent's renewal application cannot be considered as establishing a new policy to be followed in the future not only because it does not purport to do so, but because it was not (as the Commission in the *Crosley* case, said any such policy should be) established by way of general regulation, and moreover, since the decision other cases decided by the Commission indicate clearly that the Commission does not concede this case to have established any such policy. See *In re application of Hiawathaland Broadcasting Co.* (WSOO), supra; *In re applications of Buffalo Broadcasting Corporation for renewal of licenses* (WKBW and WGR), F. C. C. Dockets 6324 and 6325, Dec. 19, 1945; *In re application of John H. Stenger, Jr.*, supra.

In the *Buffalo* case the Commission found that the applicant for renewal of license had, over a period of many years, concealed from the Commission in violation of its regulations facts showing that the applicant had illegally transferred rights under its licenses to third persons. In contradistinction to the instant case, where the facts withheld from the Commission did not show that respondent had acted in contravention of either the basic principles or any provision of the Communications Act of 1934, in the *Buffalo* case the Commission found that the applicant had concealed "an arrangement for the operation of Stations WKBW and WGR which is in contravention of basic principles of the Communications Act of 1934." This concealment, the Commission found, was effectuated by misrepresentations made in sworn applications and reports filed with the Commission over a period of many years. Nevertheless, the Commission did not find the applicant not qualified to be a licensee. Instead the Commission concluded as follows:

"The failure of the Buffalo Broadcasting Corporation to make full disclosure in its reports to the Commission of its agreements with the Churchill Tabernacle indicates a lack of candor and care in the preparation of the reports. While this had a direct bearing on the applicant's qualifications, we do not conclude that in this case the omissions were so serious—particularly in view of the fact that one of the basic agreements was before the Federal Radio Commission—as to require the applicant to be deprived of the value of the stations which it has successfully operated for more than fifteen years. Nor, do we conclude, that for this reason the applicant should be found disqualified to ever again operate a radio station."

It is not, therefore, necessary to argue whether or not the Commission would have power to adopt a policy which would establish that any person making a misrepresentation, however immaterial and for whatever motive, was thereby disqualified to become or continue to be a licensee of a radio station. It is sufficient on this point to mention that the Commission, either through appreciation of its lack of power to do so, or appreciation of the lack of wisdom of any such policy, has refrained from attempting to establish it.

There has never been a case in which the Commission or its predecessor, the Federal Radio Commission, has renewed a license or dismissed a revocation proceeding after finding that a licensee had made misrepresentations to it, where the station has not thereafter been operated in the public interest. In the *Ocala* and *Panama City* cases, *supra*, the Commission did not revoke the licenses notwithstanding a finding of false representations as to the true owners of the stations. Since then the Commission has renewed the station licenses with a finding that they are serving public interest. In the case of the Texas stations, *supra*, where far more serious offenses were found to have been committed than are charged against respondent, the Commission's renewal of the station licenses has proved by experience to have been in the public interest. There is no

single instance where a person whose license was renewed after he had been found to have made misrepresentations to the Commission, thereafter failed to discharge the responsibilities of a licensee. Indeed, there have been many instances in which the Commission has found that in the operation of a station a licensee has committed crimes, carrying a statutory penalty of fine and imprisonment, but such licensees have thereafter operated in the public interest. *WRBL Radio Service Station, Inc. (WRBL)*, 2 F. C. C. 687; *KXL Broadcasters (KXL)*, 4 F. C. C. 186.

It cannot be argued, therefore, that the experience of the Commission has demonstrated the reasonableness or logic of the Commission's decision in the instant case; in fact such experience has shown that the opposite conclusion has, without exception, produced beneficial results in every case in which it has been applied. If the Commission could point to some experience which demonstrates that once a licensee is found to have misrepresented, or to have concealed a fact from the Commission, such licensee thereafter proved unfit to continue operating a station, there might be a basis for argument in the instant case. But the experience of the Commission proves the contrary.

Nor can the Government find support in the experience or decisions of other administrative agencies for the conclusion reached by the Commission on respondent's renewal application.* On the contrary the decisions of the

* An examination of the cases cited by the Government (Gov. Br. 29) reveals that they in no wise support the bald proposition that a mere concealment or misstatement provides a sufficient basis for an administrative agency to deny an application for license. Briefly, the administrative agency decisions cited (Gov. Br. 29, n. 10) may be distinguished from the case in issue on the ground that in each of them the agency determined that the fact concealed was material to the licensing function required of it, the statute providing for refusal of a license for *material* misrepresentations (*In the Matter of Securities Exchange Corporation*, 2 S. E. C. 760; *In the Matter of Charles P. Rogers*, 3 S. E. C. 597; *L. P. Atwater*, 3 S. E. C. 763; *In the Matter of Mine Sales, Inc.*, 5 S. E. C. 574); and that, when the true facts were brought to light, the applicants were found to be actually disqualified (*In re Bessie Silverfarb*,

Interstate Commerce Commission, whose functions as a licensing body are much closer to those exercised by the Commission than any of the agencies whose decisions are cited in the Government's brief (Gov. Br. 29) are in striking contrast to the reasoning expressed by the Commission in its decision on respondent's application. In *Union Pacific R. R. Common Carrier Applications*, 2 M. C. C. 573, 575 (1937), the Interstate Commerce Commission stated:

> "It is quite clear, we think, that the service here contemplated is required by public convenience and necessity. Applicant's willingness and ability to carry on the operation are not questioned. The statute requires, however, that we find also that applicant is 'fit' properly to perform the services proposed and to conform to the provisions of the Act, and our require-

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3 A. D. 880; *Federal Storage Warehouses, Inc.*, 43 M. C. C. 673; *Burbridge Common Carrier Application*, 14 M. C. C. 412). The decisions of the Office of Price Administration (*In the Matter of Tramor Cafeteria, Inc.*, 3 O. P. A. Op. and Dec. 6215; *In the Matter of Maynard Wood*, 3 O. P. A. Op. and Dec. 6220; *In the Matter of Mark C. Bloome*, 3 O. P. A. Op. and Dec. 6208), are plainly distinguishable in that they involved suspension orders which were emergency measures, immediately required to stop "leaks" of scarce materials during Wartime. The Civil Aeronautics Board decision (*Hassan Ali Easmeil*, Docket No. SR-1056, Mar. 27, 1945) involves no misrepresentation in an application for license, but revocation of an existing operator's permit, because the permittee had altered it to show an authorization greater than was actually granted, coupled with the fact that the permittee was found guilty of cheating in an examination for an instructor's license.

Of the Court decisions cited in support of the same proposition (G. Br. 29, nn. 11-12) all except three (*Great Western Broadcasting Ass'n, Inc.* v. *F. C. C.*, 94 F. (2d) 244 (App. D. C.); *Archer* v. *S. E. C.*, 133 F. (2d) 795 (C. C. A. 8); *Talbert* v. *Sims*, 143 F. (2d) 958 (C. C. A. 4)) involve permits under the National Prohibition Act or Federal Alcohol Administration Act, under both of which, because of the nature of the business licensed, the licensing agency was given an almost absolute discretion in determining the qualifications essential to obtain a permit to engage in the regulated business. Moreover, the cases cited by the Government may be distinguished from the present case on the ground that in each of them there was found either a concealment of the real party in control of the applicant (*National Grain Yeast Corp.* v. *Mitchell*, 51 F. (2d) 500 (C. C. A. 3); *Wynne* v. *Romonat*, 46

ments, rules, and regulations thereunder. Some question as to applicant's fitness has been raised by its unauthorized commencement on December 21, 1936, of bus service for the carriage of interstate passengers and their baggage over the route hereinbefore described and by its maintenance of that service until the end of the winter season, April 1, 1937, although previously warned that the described operations were in contravention of the Act. Nevertheless, we do not deem it necessary to review here the evidence respecting this phase of the matter, for proceedings have been instituted against applicant in the United States District Court in and for the District of Idaho, Central Division, on account of these unauthorized operations, and, moreover, it is our understanding that they have not been resumed since the beginning of the summer season at the Lodge on July 1, 1937, by conducting these unauthorized operations, applicant rendered itself liable to prosecutions and, upon our initiative, it

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F. (2d) 29 (C. C. A. 3); *Newark Bay Cereal Beverage Co.* v. *Wynne*, 57 F. (2d) 83 (C. C. A. 3); *Thomas J. Molloy & Co.* v. *Berkshire*, 143 F. (2d) 218 (C. C. A. 2); *Archer* v. *S. E. C.*, 133 F. (2d) 795 (C. C. A. 8); *Levers* v. *Anderson*, 153 F. (2d) 1008 (C. C. A. 10)); or a finding that the parties whose interest were concealed were, because of past misconduct, disqualified under the statute to have an interest in a liquor license (*Middlesboro Liquor & Wine Co.* v. *Berkshire*, 133 F. (2d) 39 (App. D. C.); *Roumanian American Winery* v. *Morgenthau*, 152 F. (2d) 452 (C. C. A. 2); *Thomas J. Molloy & Co.* v. *Berkshire*, supra); or a finding that the applicant was not in fact financially or otherwise able to conduct the business under the license applied for (*Great Western Broadcasting Ass'n* v. *F. C. C., supra; Doran* v. *Judd*, 31 F. (2d) 108 (C. C. A. 3); *National Grain Yeast Corp.* v. *Mitchell*, supra). In *Higgins* v. *Mills*, 22 F. (2d) 913 (C. C. A. 2), a revocation proceeding there had been a past record of unlawful operation under the license which had been granted. The case of *Talbert* v. *Sims*, supra, is not in point since the decision turned on the question of whether the acts of an agent in violation of the rationing regulations of the O. P. A. could be attributed to his employer.

The cases referred to above illustrate the importance of relating the fact that false statements have been made, to the fitness of the person making the false statement to effectuate the policies sought to be accomplished by the regulatory statute. None of the cases offer even a close parallel to the point at issue in the instant case.

is being prosecuted. The matters of guilt and, if guilt be proved, of punishment are now before the court for determination. Assuming that applicant should be punished, it does not follow that the public should also, in effect, be punished by being deprived of service which the evidence shows that public convenience and necessity require. In *House Contract Carrier Application*, 1 M. C. C. 725, and other cases, we have found that the fact that an applicant may have violated the Act is not an absolute bar to the grant of a certificate or permit."

In *Leatham Brothers Contract Carrier Application*, 2 M. C. C. 639, 640-641 (1937), the Interstate Commerce Commission again expressed a view, consistent with decisions of the Federal Communications Commission, rendered prior and after the decision on respondent's application, but directly in conflict with the views expressed by the Commission in the decision in the instant case:

"As stated in *Garritson & Guhrt Contract Carrier Application*, 1 M. C. C. 751, 753, violations of the Act and of other laws are facts, which properly may be considered in determining the fitness of an Applicant, but they are not an absolute bar to the granting of a certificate or permit. Upon consideration of all the fact of record, including those relating to applicant's unlawful operations, we are of the opinion that applicants are fit to perform the service and willing to conform to the provisions of the Act and our requirements, rules and regulations thereunder."

3. *There is no logical nexus between the Commission's findings and its conclusion.*

There is utterly lacking in the Commission's decision the necessary connecting link between the finding that a misrepresentation was made to the Commission and the ultimate conclusion that respondent cannot be entrusted with the responsibilities of a licensee. If the Commission had also found that the facts withheld from the Commission were material to a determination of the respondent's qual-

ifications, that is to say, that the disclosure of Pickard's interest would have justified or required a denial of respondent's license, such a finding would lend some support to the Commission's conclusion.* Of course, no such finding was or could be made in this case. If the Commission had found that the purpose of the concealment had been to further some pecuniary or personal aim of respondent, or had been instigated by the respondent or any of its officers, directors or stockholders to induce the Commission to take some action or to deter the Commission from taking any action, that too would have lent some color of reasonableness to its conclusion. But the record shows that the concealment was to satisfy personal business considerations of Pickard, and the Commission so found in its decision. If the Commission had found that the purpose or effect of the concealment was to hamper or impede the Commission in the discharge of its functions, this might also have tended to connect up in some measure the charged misrepresentation with the conclusion of untrustworthiness. But the Commission made no such finding. (On the contrary it found (R. 31, 34-35) that Smith, who is charged with having made the misrepresentation, repeatedly sought to obtain consent from Pickard to make full disclosure to the Commission concerning his interest in respondent corporation.) And it is clear, as shown above, that the facts as to Pickard's interest were of no importance to the Radio Commission or the Communications Commission in the exercise of its licensing function.

If the Commission had found that the respondent's failure to disclose the Pickard interest, immaterial though it may have been in this particular case, was characteristic of the manner in which respondent answered inquiries of the Commission on other matters, or prepared its applications and reports, and was merely one of many concealments or false representations that respondent had made

* Cf. *In the Matter of Revocation of Station License of Station WSAL*, 8 F. C. C. 34, 37.

on sundry unrelated matters, a more plausible connection between the Commission's finding and conclusion would thereby have been supplied. But the record shows that such a finding was not and could not be made because, with the exception of this single non-disclosure, the respondent's record in this respect is unblemished. If the Commission had found that respondent's attitude as a licensee had been one of defiance of the Commission and recalcitrant refusal to accede to the Commission's regulatory jurisdiction, its conclusion might have been supplied with some of the lacking support. But the record shows (R. 54-55) that the respondent offered first to buy up the Pickard stock, if that would be satisfactory to the Commission, and later respondent proposed a complete reorganization of the corporation, subject to the Commission's approval, which would have guaranteed that no person now connected with respondent corporation would have any control over the future operations or policy of the station.

It is not suggested that the foregoing considerations are the only ones that could possibly supply a connecting link between the Commission's finding of concealment and its conclusion in the instant case. Respondent does contend, however, that absent any connecting link between the finding of concealment and the conclusion of untrustworthiness the Commission's conclusion must in law be deemed arbitrary and capricious. *Saginaw Broadcasting Co.* v. *F. C. C.*, 68 App. D. C. 282, 96 F. 2d 554, (*cert. denied*; 305 U. S. 613).

Respondent is not arguing that licensees of radio stations may make false representations to the Commission with impunity. The same sanctions that apply with respect to the making of false statements to any other government department or agency apply with equal force to persons dealing with the Federal Communications Commission. (See e. g., 18 USC § 80.) Congress evidently conceived them to be adequate. The Commission apparently does not. It lies with the Congress, not the Commission, however, to change this.

Respondent contends that the Commission cannot establish as an absolute qualification for license, or renewal of license, a record of unwaivering truthulness on immaterial as well as material matters. In the law, as in every field of human experience, the distinction which respondent is here making between material and immaterial false statements is recognized. One need not undertake a defense of false statements to assert that the law does not contemplate in determining civil liability that private citizens in their dealings with each other or with their government are, or need to be truthful about matters which are not material in a legal sense. It is not a condonation of the making of immaterial false statements, but a recognition that neither judicial nor executive intervention is warranted to insure truthfulness in immaterial matters, that underlies the policy of the law which allows no recovery in an action for fraud or deceit unless the misrepresentation which is the basis of the action is a material one. Prosser on Torts, 1941 § 88; *Ming* v. *Woolfolk*, 116 U. S. 599, 602. In the case of false swearing, no criminal liability attaches unless the swearing is with respect to a material fact. 18 USC § 231; see *Hill* v. *U. S.*, 54 F. 2d 599; *Blackmon* v. *U. S.*, 108 F. (2d) 572.

The Government cities two criminal cases (Gov. Br. 33) *Kay* v. *U. S.*, 303 U. S. 1, and *U. S.* v. *Presser*, 99 F 2d 819, presumably to support its contention that the immateriality of the concealment of the Pickard stock interest in determining the qualifications of respondent to continue as a licensee was of no consequence. Of course, in a criminal prosecution for willful misstatements to a Government agency it is not necessary to prove that the agency was in fact misled by the false statements any more than in a prosecution for perjury it is necessary to prove that the jury did in fact rely upon the false testimony. But in either case the false statement must be with respect to a fact which, if relied upon, would have had some influence on the decision of the jury or the Government agency, and not with respect to a fact which in no way could possibly have

influenced a decision. In the *Kay* case, it is true that the false statement made by the defendant did not influence the HOLC because it was detected before the agency took any action in reliance upon it, but there is no question but that if the agency had relied upon the false statement, there would have resulted a financial loss to the Government. In the *Presser* case the defendant made false statements with respect to the payment of prevailing wages on a WPA contract under circumstances where his commitment to pay prevailing wages was a condition precedent to the awarding of his contract. In that case the false statements were obviously as to a fact which was material and relied upon by the Government agency.

Certainly Congress did not intend in the Communications Act to authorize the Commission to undertake a moral reform. It seems hardly necessary to point out that broadcasting does not possess any peculiar or special attributes, which distinguish it from other fields of endeavor, such as to require that persons who obtain licenses for broadcasting stations shall be more moral, more truthful or more saintly than persons engaged in other businesses. The nature of the regulatory jurisdiction which the Commission exercises over licensees is not so different from that which other regulatory agencies exercise in other fields as to require a special moral character in persons operating radio stations. (Cf. 15 USC § 77 www.) If there is an inevitable connection between making false statements to the Commission and a disability to operate a radio station in the public interest, it lies with Congress to specify it. It certainly is not within the province of the Commission to add new qualifications to those laid down by Congress. Cf. *Tri-State Broadcasting Company* v. *F. C. C.*, 68 App. D. C. 292, 96 F. 2d 564; *Stahlman* v. *F. C. C.*, 75 App. D. C. 176, 126 F 2d 124; *F. C. C.* v. *Sanders Bros. Radio Station*, 309 U. S. 470.

The argument that the concealment of information is in and of itself a basis for refusing to renew the license, without regard to whether the Commission places any reliance

upon the information withheld, and without regard to the probable future conduct of the licensee and the effect upon the public of deleting the station, may offer a convenient rule-of-thumb procedure for the Commission to follow, but it overlooks the duty of the Commission to be governed by statutory criteria and considerations of public interest. Ease of regulation is no justification for arbitrary administrative action.

C. The Use by Congress of the Word Character in Section 308(b) Of The Act Furnishes No Support For The Commission's Refusal To Renew The WOKO License.

The Government's brief (pp. 25-26) lays great stress on the use of the term "character" in § 308(b) of the Act. It is not entirely clear whether its conclusion is:

a) one who cannot be "entrusted with the responsibilities of a licensee" is, therefore, lacking in the necessary character or fitness to operate a station,

or,

b) one who conceals and misrepresents facts in applying for a license or renewal thereof is by that fact shown to be lacking in the necessary character or fitness to operate a station,

or whether the Government is making both contentions. Neither argument furnishes any reason for reversing the court below.

We concede that a conclusion of character disqualification follows from a conclusion of lack of trustworthiness to program and operate a broadcast station in the public interest. We go further and concede that no explicit finding on "character" is necessary in such a case; for a properly grounded conclusion of "untrustworthiness to operate a station" is a sufficient basis for refusal to renew a station license. The defect in the Commission's decision and the

basis of reversal by the court below lies in the fact that the Commission made no findings adequate to support its conclusion that respondent could not for any reason be relied upon to continue the operation of WOKO in the public interest, and in the fact that the record furnishes no support for any finding that respondent cannot be trusted to program and operate WOKO in the public interest. Since the conclusion of "untrustworthiness" was unsupported, any conclusion of lack of "character" predicated on the defective conclusion of untrustworthiness would be equally unsupported.

The Government's argument (Gov. Br. 25-29) also fails when viewed as the assertion that the finding of misrepresentation would justify a finding of lack of character on some other basis. On this point it couples Section 308(b) of the Act:

> ". . . the application 'shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, *character*, and financial, technical, and other qualifications of the applicant to operate the station'" (Italics are the Government's.)

with Section 3.24 of the Commission's regulations:

> "An authorization for a new standard broadcast station or increase in facilities of an existing station will be issued only after a satisfactory showing has been made in regard to the following, among others:
>
> • • •
>
> "(d) That the applicant is legally qualified. That the applicant (or the person or persons in control of an applicant corporation or other organization) is of *good character* and possesses other qualifications sufficient to provide a satisfactory public service." (Italics ours.)

and suggests that one who conceals facts through misrepresentation does not have good character. The short answer to this is that the Commission made no finding that

respondent did not have "good character". The uniform precedents of the Commission establish that the making of misrepresentations to the Commission does not in itself justify a conclusion of lack of character to become or continue a licensee of a broadcast station.* In the absence of any expression of intention by the Commission in its decision to depart from these cases it is not open to counsel to argue here that they have no application.

The Government's "character" argument, therefore, if it implies merely that trustworthiness is an essential element of character or fitness to program and operate a broadcast station in the public interest, fails as an untenable bootstrap contention unless the conclusion of "untrustworthiness" can stand; if the argument implies that "character" should be substituted for "untrustworthiness" because it means something different, then it fails because the Commission made no finding that respondent was wanting in any other essential element of character or fitness to continue to program and operate Station WOKO in the public interest.

CONCLUSION.

The court below properly held that the Commission's refusal to renew the license of Station WOKO was an unlawful imposition of a sanction, and cannot stand as a valid determination by the Commission that respondent does not possess the necessary qualifications to continue to operate Station WOKO in the public interest, convenience and necessity.

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* See cases cited p. 46.

Wherefore, respondent respectfully prays that this Court affirm the decision of the United States Court of Appeals for the District of Columbia reversing the decision of the Federal Communications Commission denying respondent a renewal of license for radio broadcast station WOKO.

Respectfully submitted,

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November 1946.

SUPREME COURT OF THE UNITED STATES

No. 65.—October Term, 1946.

Federal Communications Commission, Petitioner, *v.* WOKO, Incorporated.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[December 9, 1946.]

Mr. Justice Jackson delivered the opinion of the Court.

WOKO, Incorporated, for some years has operated a radio station at Albany, New York, and appears to have rendered public service of acceptable quality and to be able to continue. The Federal Communications Commission refused to renew its license because of misrepresentations made to the Commission and its predecessor as to the ownership of the applicant's capital stock. Two hundred and forty shares, being twenty-four per cent of its outstanding capital stock, was owned by one Pickard and his family. For some twelve years they received all dividends paid on the stock and Pickard took an active interest in the Company's affairs. He also was a vice-president of the Columbia Broadcasting Company and had obtained the stock on the assurance that he would help to secure Columbia affiliation for Station WOKO, would furnish, without charge, Columbia engineers to construct the station at Albany, and supply a grand piano and certain newspaper publicity.

The company, however, in reporting to the Federal Radio Commission and to the Federal Communications Commission the names of its stockholders as it was required to do for many years and in many applications, concealed the fact that the Pickards held this stock interest and represented that the shares were held by others. Its general manager appeared on behalf of the applicant at

various hearings and furnished false testimony to both Commissions regarding the identity of the corporation stockholders and the shares held by each so as to conceal the Pickard holdings. The purpose of the concealment was to prevent the facts from becoming known to Pickard's Columbia colleagues.

The Court of Appeals for the District of Columbia reversed the Commission's decision denying renewal of the license, a majority for the various reasons that we will consider. The dissenting Chief Justice noted that he did "very heartily agree with the view that this is a hard case. The Commission's drastic order, terminating the life of the station, punishes the innocent equally with the guilty, and in its results is contrary to the Commission's action in several other comparable cases. But that the making of the order was within the discretion of the Commission, I think is reasonably clear." We granted certiorari because of the importance of the issue to the administration of the Act.

We come to a consideration of the reasons which led the Court of Appeals to reverse the order of the Commission under the admonition that "review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious." 48 Stat. 1094, 47 U. S. C. § 402 (e).

The Act provides as to applications such as WOKO filed that "All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station . . . and such other information as it may require." It requires such statements to be under oath or affirmation. 48 Stat.

1084, 47 U. S. C. § 308 (b). It provides, too, that any station license may be revoked for false statements in the application. 48 Stat. 1086, 47 U. S. C. § 312 (a).

It is said that in this case the Commission failed to find that the concealment was of material facts or had influenced the Commission in making any decision, or that it would have acted differently had it known that the Pickards were the beneficial owners of the stock. We think this is beside the point. The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones. We do not think it is an answer to say that the deception was unnecessary and served no purpose. If the applicant had forthrightly refused to supply the information on the ground that it was not material, we should expect the Commission would have rejected the application and would have been sustained in so doing. If we would hold it not unlawful, arbitrary or capricious to require the information before granting a renewal, it seems difficult to say that it is unlawful, arbitrary or capricious to refuse a renewal where true information is withheld and false information is substituted.

We are told that stockholders owning slightly more than 50 per cent of the stock are not found to have had any part in or knowledge of the concealment or deception of the Commission. This may be a very proper consideration for the Commission in determining just and appropriate action. But as matter of law, the fact that there are innocent stockholders can not immunize the corporation from the consequences of such deception. If officers of the corporation by such mismanagement waste its assets, presumably the State law affords adequate remedies against the wrongdoers. But in this as in other matters, stockholders entrust their interests to their chosen officers and often suffer for their dereliction. Consequences of

such acts cannot be escaped by a corporation merely because not all of its stockholders participated.

Respondent complains that the present case constitutes a departure from the course which the Commission has taken in dealing with misstatements and applications in other cases. Much is made in argument of the fact that deceptions of this character have not been uncommon and it is claimed that they have not been dealt with so severely as in this case. *Cf. Navarro Broadcasting Association*, 8 F. C. C. 198. But the very fact that temporizing and compromising with deception seemed not to discourage it, may have led the Commission to the drastic measures here taken to preserve the integrity of its own system of reports. The mild measures to others and the apparently unannounced change of policy are considerations appropriate for the Commission in determining whether its action in this case is too drastic, but we cannot say that the Commission is bound by anything that appears before us to deal with all cases at all times as it has dealt with some that seem comparable.

It also is contended that this order inflicts a penalty, that the motive is punishment and that since the Commission is given no powers to penalize persons, its order must fall. We think it unnecessary to indulge in the exposition of what a penalty is. It is enough to decide this case to know what a penalty is not. A denial of an application for a license because of the insufficiency or deliberate falsity of the information lawfully required to be furnished is not a penal measure. It may hurt and it may cause loss, but it is not made illegal, arbitrary or capricious by that fact.

Lastly, and more importantly, the Court of Appeals suggested that in order to justify refusal to renew, the Commission should have made findings with respect to the quality of the station's service in the past and its equipment for good service in the future. Evidence of the station's adequate service was introduced at the hearing.

The Commission on the other hand insists that in administering the Act it must rely upon the reports of licensees. It points out that this concealment was not caused by slight inadvertence nor was it an isolated instance, but that the Station carried on the course of deception for approximately twelve years. It says that in deciding whether the proposed operations would serve public interest, convenience or necessity, consideration must be given to the character, background and training of all parties having an interest in the proposed license, and that it cannot be required to exercise the discretion vested in it to entrust the responsibilities of a licensee to an applicant guilty of a systematic course of deception.

We cannot say that the Commission is required as a matter of law to grant a license on a deliberately false application even if the falsity were not of this duration and character, nor can we say that refusal to renew the license is arbitrary and capricious under such circumstances. It may very well be that this Station has established such a standard of public service that the Commission would be justified in considering that its deception was not a matter that affected its qualifications to serve the public. But it is the Commission, not the courts, which must be satisfied that the public interest will be served by renewing the license. And the fact that we might not have made the same determination on the same facts does not warrant a substitution of judicial for administrative discretion since Congress has confided the problem to the latter. We agree that this is a hard case, but we cannot agree that it should be allowed to make bad law.

The judgment of the Court of Appeals is reversed and the case remanded to that court with direction to remand to the Commission.

MR. JUSTICE BLACK took no part in the consideration or decision of this case.